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## The Lottery Docket

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# THE LOTTERY DOCKET

Daniel Epps\* & William Ortman\*\*

*We propose supplementing the Supreme Court’s caseload with a “lottery docket” of cases selected at random from final judgments of the circuit courts. The Court currently possesses almost unfettered authority to set its own agenda through its certiorari jurisdiction. By rule and custom, the Court exercises that discretion by selecting cases that it sees as important, in a narrow sense of that term. The Court’s free hand in agenda setting has obvious benefits, but it has drawbacks as well. It deprives the Court of critical information about how the law operates in ordinary cases. It signals to circuit courts that their decisions are unreviewable—and thus unaccountable—in unimportant cases. And it passes over many cases that are important in a less narrow sense. The Court uses the existence of a circuit split to identify cases as important, but splits are merely proxies for, not measures of, importance. While many issues selected through the certiorari process are important, not all important issues are selected by certiorari.*

*More fundamentally, we question the premise that only “important” cases deserve the Court’s attention. The legal system would be improved if every Term, the Supreme Court were forced to decide some unquestionably unimportant cases—run-of-the-mill appeals dealing with the kinds of legal questions that the lower courts resolve every day. Over the long run, a lottery docket would offset the pathologies of the certiorari system without depriving the Court of its ability to resolve questions that have divided the lower courts.*

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#### INTRODUCTION

The Supreme Court today has nearly boundless power to decide which cases it will hear. This was not always so. Until 1891, litigants in many classes of cases could appeal to the Supreme Court as a matter of right.<sup>1</sup> As late as 1988, the Supreme Court was obligated to hear any case in which a federal court invalidated a state or federal statute on constitutional grounds.<sup>2</sup> But for almost thirty years, with the expansion of certiorari jurisdiction, the Court's power to set its own agenda has been nearly limitless.<sup>3</sup> By rule and custom, the Court exercises its discretion by selecting cases that are important, in a narrow sense of that term. Most commonly, the Court deems cases worth hearing if they turn on questions of law that divide the lower courts.<sup>4</sup>

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1. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1650–51 (2000).

2. See Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 90 (1988).

3. See *infra* Section I.A.

4. See *infra* Section I.A.

Critiques of the Court's agenda-selection practices have mounted in recent years. Critics complain that the Court hears too few cases,<sup>5</sup> that it ignores particular areas of law,<sup>6</sup> and that its docket has been "captured" by an elite Supreme Court bar.<sup>7</sup> Few, however, question certiorari's basic premise—that only legally *important* matters deserve the Court's attention. All seem to agree that the Supreme Court should devote itself to resolving the important cases; the quarrel concerns how the Court should identify which cases are important, and how many of those it should hear each year.

This Article questions the premise that only "important" cases deserve the Court's attention. We argue that the legal system would benefit if, every Term, the Supreme Court were forced to decide some unquestionably *unimportant* cases—some run-of-the-mill appeals dealing with the kinds of ordinary and seemingly inconsequential legal questions that the lower courts resolve every day. Specifically, we propose that the Court—or Congress, by statute—supplement the traditional certiorari docket with a small number of cases randomly selected from final judgments of the circuit courts.<sup>8</sup> This proposal would, unquestionably, mean that the Court would end up devoting time to some seemingly trivial cases. But though the Supreme Court's attention is a scarce resource, spending some of it this way could provide surprising benefits. Getting the Supreme Court to hear a few more ostensibly unimportant cases could help advance deeply important goals.

The argument proceeds as follows. In Part I, we begin with some background on the history of the Supreme Court's jurisdiction. We then explain the Court's current certiorari process. The Court uses a set of proxies—principally, the existence of a circuit split—to identify legally important cases in which to grant certiorari.<sup>9</sup> This approach has obvious advantages.

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5. See, e.g., Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 432–38; Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1378–82 (2006). In its October Term 2014, the Supreme Court decided 74 cases on their merits. See *The Supreme Court, 2014 Term—The Statistics*, 129 HARV. L. REV. 381, 381 (2015) [hereinafter *The Statistics, October Term 2014*] (noting that the Court issued opinions in seventy-four cases during OT 2014). Thirty years earlier, in the October Term of 1984, the Court decided 151 merits cases. See *The Supreme Court, 1984 Term—The Statistics*, 99 HARV. L. REV. 322, 322 (1985) (noting that the Court issued 151 opinions during OT 1984).

6. See, e.g., Frederick Schauer, *Is It Important to Be Important?: Evaluating the Supreme Court's Case-Selection Process*, 119 YALE L.J. ONLINE 77, 81–82 (2009), [https://www.yalelawjournal.org/pdf/839\\_rgqgoasj.pdf](https://www.yalelawjournal.org/pdf/839_rgqgoasj.pdf) [<http://perma.cc/AZZ4-8T2Q>]; Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 296–313 (2006).

7. Richard J. Lazarus, *Docket Capture at the Supreme Court*, 119 YALE L.J. ONLINE 89, 89–90 (2009), [https://www.yalelawjournal.org/pdf/841\\_89m7e6cx.pdf](https://www.yalelawjournal.org/pdf/841_89m7e6cx.pdf) [<https://perma.cc/H9J3-LNXL>].

8. For a number of reasons that will become clear, the main thrust of our proposal is limited to review of decisions by the lower federal courts, as opposed to state courts of last resort. Later, however, we consider the possibility that the proposal could include review of state court judgments as well. See *infra* Section III.C.

9. See *infra* notes 70–73 and accompanying text.

Most critically, it enables the Court to unify federal law by resolving questions that have divided the lower courts.<sup>10</sup>

But this approach introduces pathologies as well—for the Court, the judiciary, and the development of federal law. First, because the justices hear only “important” cases, they are isolated from the day-to-day work of the lower federal courts in ordinary, “unimportant” cases. This means that the justices are systemically deprived of information about how statutes, regulations, and even their own decisions play out in the mine-run of cases.<sup>11</sup> Second, when a circuit court decides a legally unimportant case—that is, a fact-bound case or a case not plausibly implicating a circuit split—it knows that the chance of Supreme Court review is practically nil. In such cases (which, we suspect, constitute the vast majority) the circuit court lacks the accountability that traditional models of judicial hierarchy—not to mention sound institutional design—presuppose.<sup>12</sup> Third, the existence of a circuit split is only a proxy for legal importance, not a measure of it, and is thus inevitably imperfect. The Court’s reliance on circuit splits to recognize legal importance misfires in systematic and predictable ways. In other words, while many, or even most, legal issues selected through the certiorari process *are* important, not all important legal issues are selected by certiorari.<sup>13</sup>

In Part II, we propose the “lottery docket”: a mechanism that could offset the pathologies of the certiorari system without depriving the Court of its ability to resolve questions that have divided the lower courts. Section II.A provides the basic outline of the proposal. Specifically, we propose that, either through Court rule or congressional enactment, the Court’s docket be expanded to include a small number of cases—perhaps twenty to forty—drawn at random from final judgments of the circuit courts. The goal would be to add enough cases to provide key benefits while not imposing such great demands on the Court’s attention to distract significantly from the certiorari docket. Section II.B explains the many benefits of this proposal. Over the long run, it would expose the justices to a more representative range of cases and issues that confront federal courts, counteracting certiorari’s informational pathology.<sup>14</sup> It would provide greater accountability over circuit courts, as circuit judges would recognize that their decisions have some chance of being reviewed even in the most quotidian cases.<sup>15</sup> And, again over the long run, it would permit the justices to hear and decide important legal questions that lack the traditional indicia of importance.<sup>16</sup>

Section II.C goes on to defend the lottery docket against several objections. First, we consider whether there are any constitutional obstacles in implementing this proposal, and find none. Though resolving the *merits* of a

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10. See *infra* text accompanying notes 125–126.

11. See *infra* Section I.B.1.

12. See *infra* Section I.B.2.

13. See *infra* Section I.B.3.

14. See *infra* Section II.B.1.

15. See *infra* Section II.B.2.

16. See *infra* Section II.B.3.

case using a random-decision procedure (like flipping a coin) could violate due process, there is no reason to conclude that randomly choosing cases for review is unconstitutional. Selecting a case for review is not a decision on the merits of the case, and traditionally, randomization in nonmerits decisionmaking is viewed as permissible.<sup>17</sup> Second, we ask whether selecting cases for review via a lottery is somehow unfair or illegitimate. We conclude that this procedure would be fairer to litigants than the current system because it would give those who experience erroneous rulings by circuit courts an additional chance to have those errors corrected.<sup>18</sup>

Third, we confront the objection that our proposal would waste the Court's scarce resources; any time dealing with lottery cases means less time dealing with the rest of the Court's caseload. We accept that there is a trade-off here, but we argue that the benefits outweigh the costs, especially if the number of lottery cases is small enough so as not to detract seriously from the certiorari docket.<sup>19</sup> Finally, we consider the problem of forgone "percolation." One argument for the Court's circuit split-focused certiorari process is that the Court will make better decisions after a legal issue has sufficiently "percolated"—that is, after a number of courts of appeals have examined the issue and aired all the best arguments on both sides of the issue. Forcing the Court to decide legal issues through mandatory appeals could short-circuit this process too early. Although this objection is not without force, percolation itself is costly—it can permit erroneous views to persist in the lower courts for years or decades longer than they might otherwise, causing significant harm to litigants in the process. Moreover, where a legal issue seems particularly in need of percolation, it is possible the Court can decide the case on narrow grounds in order to preserve room for further lower court consideration.<sup>20</sup>

In Part III, we consider a number of more fine-grained design questions involved in implementing the proposal. Should all decisions of the circuit courts be included in the lottery, or should litigants affirmatively have to opt in?<sup>21</sup> Should the lottery be weighted to prioritize categories of cases underrepresented on the certiorari docket?<sup>22</sup> And should state court decisions (as opposed to merely decisions of the federal courts of appeals) be entitled to enter the lottery?<sup>23</sup> Rather than provide firm answers to these questions, we merely indicate the relevant considerations that would have to be analyzed in attempting to answer them.

We are ultimately agnostic about many of the finer details. We are confident, however, that introducing some version of our lottery proposal to the Supreme Court's docket would be an improvement over the current system.

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17. See *infra* Section II.C.1.

18. See *infra* Section II.C.2.

19. See *infra* Section II.C.3.

20. See *infra* Section II.C.4.

21. See *infra* Section III.A.

22. See *infra* Section III.B.

23. See *infra* Section III.C.

Choosing a few cases through random selection would result in more important issues being correctly identified and decided by the Court, create more accountability over the circuit courts, give the Court more information, and give losing litigants some chance of having serious errors corrected. As arbitrary and random as the certiorari process seems, introducing more randomness is actually the best solution.

## I. THE CERTIORARI PROCESS AND ITS PATHOLOGIES

This Part surveys the Court's process for selecting cases. Section I.A explains the history and development of certiorari jurisdiction and how the process works today. Section I.B identifies several problems with the Court's current case-selection process. Section I.C briefly reviews previous proposals for reform of the certiorari process.

### A. *The Modern Certiorari Process*

For the first century of its existence, the Supreme Court had no authority to choose what cases it would decide.<sup>24</sup> In the Judiciary Act of 1789,<sup>25</sup> Congress gave the Court appellate jurisdiction over many decisions from the circuit courts<sup>26</sup> as well as state court decisions that "defeated rights set up by the appellant under the Constitution, laws or treaties of the United States."<sup>27</sup> For these cases, the Supreme Court's appellate jurisdiction was mandatory; if a writ of error was filed, the Court was obliged to resolve the case.<sup>28</sup>

The first glimmer of discretionary review appeared in 1891, when Congress passed the Circuit Courts of Appeals Act.<sup>29</sup> The Act was a response to a perceived crisis with the Court's increasingly unmanageable caseload; at the start of the 1890 Term, the justices had a backlog of 1,800 cases.<sup>30</sup> Congress's

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24. Hartnett, *supra* note 1, at 1649.

25. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

26. The Act provided that the Supreme Court could examine, on a writ of error, final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs.

*Id.* § 22. The Court also was granted original jurisdiction over several classes of cases. *See id.* § 13. Some of this jurisdiction was exclusive (for example, cases between two different states), some was not (such as suits between a state and a citizen of another state). *See id.*

27. Akhil Reed Amar, Colloquy, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1519 (1990) (discussing section 25 of the Judiciary Act§ ). For a fascinating argument that Amar and others are wrong in concluding that section 25 granted the Supreme Court jurisdiction over state criminal prosecutions, see Kevin C. Walsh, *In the Beginning There Was None: Supreme Court Review of State Criminal Prosecutions*, 90 NOTRE DAME L. REV. 1867 (2015).

28. Amar, *supra* note 27, at 1519.

29. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

30. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 299 (1991); Hartnett, *supra* note 1, at 1650.

solution was to create a new set of federal courts—the circuit courts of appeals—with appellate jurisdiction over various classes of decisions that previously would have been directly appealable to the Supreme Court.<sup>31</sup> Some of the circuit courts’ decisions were, in turn, appealable to the Supreme Court.<sup>32</sup> But for other types of cases, the Act declared, the judgments of the circuit courts of appeals were “final.”<sup>33</sup> Yet, for such “final” decisions, the Act permitted “the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.”<sup>34</sup>

This language was the first step of a radical change in the Supreme Court’s role. There is little indication, however, that the Act’s drafters understood that they were sparking a revolution.<sup>35</sup> Instead, the inclusion of the certiorari power “was envisioned as a sort of fallback provision.”<sup>36</sup> As Peter Linzner put it:

[T]he draftsmen of the 1891 Act intended the specific reference to certiorari not to create a totally new statutory form of discretionary appeal but simply to serve as a safety valve to permit the Supreme Court, by use of common law certiorari, occasionally to take up important cases, primarily involving conflicts between circuits, in areas of law as to which the circuit courts of appeals had “final” jurisdiction.<sup>37</sup>

It is thus unsurprising that “[t]he Court did not immediately exploit the potential of discretionary jurisdiction,” granting certiorari writs only twice in the two years after the 1891 statute’s enactment.<sup>38</sup> But within a short time, the use of certiorari grew to encompass nearly a fifth of the Supreme Court’s docket.<sup>39</sup> The scope of the Court’s discretionary power expanded further in 1914, when Congress extended certiorari review to state court judgments upholding federal claims or defenses,<sup>40</sup> and then again in 1916, when the Webb Act expanded the list of judgments considered “final” but reviewable on certiorari.<sup>41</sup>

Perhaps the most significant change, however, occurred in 1925 with the passage of the “Judges’ Bill.”<sup>42</sup> The legislation acquired this nickname both

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31. See Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1232–33 (1979).

32. See Hartnett, *supra* note 1, at 1650.

33. Act of Mar. 3, 1891, § 6, 26 Stat. at 828.

34. *Id.*

35. See Hartnett, *supra* note 1, at 1655.

36. *Id.* at 1656.

37. Linzer, *supra* note 31, at 1235–36 (footnotes omitted).

38. DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 10 (1980).

39. *Id.* at 10–11.

40. See Hartnett, *supra* note 1, at 1657.

41. See Linzer, *supra* note 31, at 1238–39.

42. See Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936.



because it was written by the Supreme Court justices themselves and because “a delegation from the Court, led by Chief Justice Taft, energetically lobbied on its behalf.”<sup>43</sup> For years, Taft in particular had sought to reduce the Court’s mandatory appellate jurisdiction and “increase the Court’s ‘absolute and arbitrary’ discretion.”<sup>44</sup> The bill accomplished Taft’s goals: it made nearly *all* decisions by the federal appellate courts final and thus reviewable only by certiorari.<sup>45</sup> The impact of the Judges’ Bill in reshaping the role and conception of the Court was tremendous. The Court’s newfound “ability to set its own agenda permitted it to ‘shed the long-standing image of a neutral arbiter and an interpreter of policy’ and emerge ‘as an active participant in making policy.’”<sup>46</sup>

Congress continued tinkering with the Court’s docket in the years to come, but the trend was consistently in favor of reducing the Court’s mandatory jurisdiction.<sup>47</sup> Indeed, the justices themselves (including, for example, Chief Justice Rehnquist) demanded ever greater discretionary power.<sup>48</sup> Finally, in the 1988 Judiciary Act,<sup>49</sup> Congress virtually eliminated the Court’s mandatory appellate jurisdiction.<sup>50</sup> This Act was “the ‘logical culmination’ of the legislative trend that began in 1891.”<sup>51</sup>

Today, the Supreme Court’s appellate jurisdiction is almost entirely discretionary. The Court’s mandatory appellate jurisdiction covers only (1) final judgments by three-judge district courts, which are required by statute for a few narrow categories of cases,<sup>52</sup> and (2) final judgments by single-

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43. PROVINE, *supra* note 38, at 11.

44. Hartnett, *supra* note 1, at 1661; *see also* PERRY, *supra* note 30, at 301 (“Reforming the judiciary was a passion of William Howard Taft. First as President, then as chief justice, he worked tirelessly toward this aim. Nowhere is this better seen than in his involvement with drafting and advocating the act of 1925.”); Jeffery R. Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation and the Rule of Four*, 15 J. THEORETICAL POL. 61, 63 (2003).

45. We say “nearly” all because, under 28 U.S.C. § 1252, all decisions striking down federal statutes—whether by district or circuit courts—were directly appealable to the Supreme Court. This provision was, however, repealed in 1988. *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

46. Hartnett, *supra* note 1, at 1718 (quoting RICHARD L. PACELLE, JR., *THE TRANSFORMATION OF THE SUPREME COURT’S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION* 15 (1991)).

47. *See* PROVINE, *supra* note 38, at 13 (“Between 1970 and 1976 Congress eliminated a series of the remaining provisions allowing appeals to the Supreme Court directly from district courts.”).

48. *See* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 970 & n.225 (2013) (“In successive letters to Congress, the Court sought a dramatic extension of certiorari jurisdiction to enable it to settle important federal questions.”).

49. Act of June 27, 1988.

50. *See* Grove, *supra* note 48, at 976–77.

51. *Id.* at 977 (quoting S. REP. NO. 100-300, at 2 (1988)).

52. Cases in which three-judge district courts are required by statute include constitutional challenges to the apportionment of legislative districts, *see* 28 U.S.C. § 2284 (2012), cases in which the court orders the release of prisoners as a remedy for prison conditions, *see* 18 U.S.C. § 3626(a)(3)(B) (2012), and cases under the Civil Rights Act of 1964 where the

judge district courts in certain antitrust decisions that the district court certifies for direct review by the Supreme Court.<sup>53</sup> The Court hears oral argument in only a handful of mandatory appeals each year,<sup>54</sup> and it decides a slightly larger number of appeals through summary affirmances.<sup>55</sup>

Instead, most of the cases the Court hears come from its certiorari docket. This is not to say that the Court decides most of the cases on the certiorari docket. From approximately 7,000–8,000 certiorari petitions every year,<sup>56</sup> the Court grants review in fewer than ninety per year.<sup>57</sup>

Winnowing down the thousands of certiorari petitions to the small number of granted cases presents no small challenge for the Court. Unsurprisingly, the Court has established “various internal streamlining devices” in order to reduce the work involved in dealing with certiorari petitions.<sup>58</sup> One such shortcut is institutional. Since 1972, many justices have combined the efforts of their chambers in the “cert pool.”<sup>59</sup> In this pool, certiorari petitions are divided among the chambers of participating justices; for any

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attorney general certifies that the case is of general public importance, see 42 U.S.C. §§ 2000a-5, 2000e-6 (2012). For a more complete list, see STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* 104–19 (10th ed. 2013).

53. 15 U.S.C. § 29(b) (2012). Only three such appeals have been certified for direct review since 1974. See SHAPIRO ET AL., *supra* note 52, at 92.

54. As of 1988, when the Court was still hearing 150 cases per Term, only 20% of the Court’s cases came from the mandatory appellate docket. See Boskey & Gressman, *supra* note 2, at 88. In the nearly three decades since, that percentage has shrunk significantly further. For example, in October Term 2015, the Court heard oral argument in only three cases from the appellate docket. See *Granted & Noted List: Cases for Argument in October Term 2015*, SUP. CT. U.S. (June 27, 2016), <https://www.supremecourt.gov/grantednotedlist/15grantednotedlist> [<https://perma.cc/V3SG-99F9>].

55. See *Statistics as of June 27, 2013*, J. SUP. CT. U.S., Oct. Term 2013, at II, III, <https://www.supremecourt.gov/orders/journal/jnl13.pdf> [<https://perma.cc/57LF-FT67>] (noting that, for October Term 2012, the Court summarily affirmed four mandatory appeals but only noted probable jurisdiction in one). A denial of certiorari carries no precedential value. See *United States v. Carver*, 260 U.S. 482, 490 (1923) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.”). A summary affirmation, by contrast, is a decision on the merits entitled to precedential weight. See *Hicks v. Miranda*, 422 U.S. 332, 343–45 (1975) (holding that lower courts must follow Supreme Court summary affirmances). That said, by all appearances, “the Justices consider the merits of an appeal only cursorily when they decide whether to grant it plenary review with full briefs and oral argument.” Linzer, *supra* note 31, at 1298. Indeed, this cursory consideration is perhaps why the Court has in recent decades made clear that, though still precedential, “a summary affirmation . . . has ‘considerably less precedential value than an opinion on the merits.’” *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1800 (2015) (quoting *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180–81 (1979)).

56. *FAQs—General Information*, SUP. CT. U.S., [https://www.supremecourt.gov/about/faq\\_general.aspx](https://www.supremecourt.gov/about/faq_general.aspx) [<https://perma.cc/3ES4-DF46>]; see also *The Statistics, October Term 2014*, *supra* note 5, at 389 (noting that the Supreme Court considered 7,038 certiorari petitions during October Term 2014).

57. SHAPIRO ET AL., *supra* note 52, at 63.

58. Boskey & Gressman, *supra* note 2, at 87.

59. See SHAPIRO ET AL., *supra* note 52, at 318–19.

given petition, only one law clerk prepares a memorandum with a recommendation that is then shared with the other justices and their clerks.<sup>60</sup> Originally created at the suggestion of Justice Powell, only five justices initially participated.<sup>61</sup> Today, seven of the nine justices participate, with Justices Alito and Gorsuch as the two holdouts.<sup>62</sup>

Another shortcut is substantive: the Court has developed rules of thumb for when certiorari is appropriate. Rather than requiring an all-things-considered judgment about a case's importance in each instance, the Court has identified criteria justifying a grant of certiorari, which it has codified in its own Rule 10.<sup>63</sup> The Rule lists several considerations that, "although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers" when ruling on a petition:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.<sup>64</sup>

Rule 10's criteria seem to capture what the justices themselves are looking for in the certiorari process.<sup>65</sup> As then-Chief Justice Rehnquist put it, "[T]here really are only two or three factors involved in the certiorari decision—conflict with other courts, general importance, and perception that

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60. See David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 953 (2007) (book review).

61. SHAPIRO ET AL., *supra* note 52, at 318–19.

62. *Id.* at 319 n.16; Adam Liptak, *Gorsuch, in Sign of Independence, Is Out of Supreme Court's Clerical Pool*, N.Y. TIMES (May 1, 2017), <https://www.nytimes.com/2017/05/01/us/politics/gorsuch-supreme-court-labor-pool-clerks.html?mcubz=2> (on file with the *Michigan Law Review*). Before Justice Scalia's death and eventual replacement with Justice Gorsuch, eight of the nine justices participated in the pool. See SHAPIRO ET AL., *supra* note 52, at 319 n.16.

63. SUP. CT. R. 10.

64. *Id.*

65. In the discussion that follows, we make broad generalizations about what the justices collectively are looking for in the certiorari process. We recognize, however, that there may be significant variation in preferences among individual justices—and perhaps especially among those of the justices who have chosen to leave the pool. Because justices rarely, if ever, explain their votes to grant certiorari, a more nuanced, justice-by-justice account would be difficult to provide. See Stras, *supra* note 60, at 971 n.154.

the decision is wrong in light of Supreme Court precedent.”<sup>66</sup> Of these, the paramount factor is the presence of a “split”—that is, a difference of opinion on a pure question of law between the federal courts of appeals or state courts of last resort. One study of the Supreme Court’s docket from 2003 to 2005 concluded that approximately 70% of the cases granted involved such a conflict between lower courts.<sup>67</sup> An unsurprising corollary is that petitions involving a lower court conflict have a much higher chance of being granted than average. A study of nearly 2,000 petitions considered during the 1982 Term concluded that 70% of petitions alleging a verifiable conflict in the lower courts were granted, compared to 7.6% overall.<sup>68</sup>

The Court’s emphasis on splits is often attributed to the important role that law clerks play in the process. Clerks, inexperienced young lawyers who are usually only a year or two out of law school, “seek objectively verifiable criteria like circuit splits and are unlikely to recommend a grant based on a belief, for example, that the lower court was simply wrong.”<sup>69</sup> Indeed, Artemus Ward and David Weiden argue that “[w]ith the creation of the cert pool in 1972, clerks increasingly emphasized circuit conflict. . . . This tendency then spread to nonpool clerks, and even attorneys, as normative isomorphic change occurred.”<sup>70</sup>

A split is not the only proxy the justices look for in the certiorari process. Other indicia of importance matter as well. For example, the fact that the U.S. solicitor general (or “SG”) files a certiorari petition provides good reason to think that the case involves an issue of national importance. The Court thus grants more than half of the petitions filed by the solicitor general, compared to 3% for other petitions in paid cases.<sup>71</sup> The presence (and quantity) of amicus briefs at the certiorari stage can also indicate that an issue is important: the fact that other individuals or organizations are willing to spend time and money on the case is a pretty good reason to think that the case has implications that extend beyond the immediate parties.

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66. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 235 (rev. ed. 2001).

67. See Stras, *supra* note 60, at 982.

68. See Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1116 (1988).

69. Carolyn Shapiro, *The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court*, 37 FLA. ST. U. L. REV. 101, 128 (2009).

70. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 132 (2006). To be sure, the justices do not follow the clerks’ recommendations blindly. One study which analyzed two separate Terms’ worth of cert pool memoranda concluded that “the Court only took the action suggested by a cert-pool memo in approximately half the cases that were granted review.” Barbara Palmer, *The “Bermuda Triangle?” The Cert Pool and Its Influence over the Supreme Court’s Agenda*, 18 CONST. COMMENT. 105, 106 (2001). Nonetheless, it is hard to contest that splits matter in the certiorari process, and it seems likely that the rise of the cert pool has had something to do with that.

71. See Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 408 (2004).

One study thus found that the Court was significantly more likely to grant a petition when amicus briefs were present.<sup>72</sup>

Although Rule 10 indicates that the Court will consider whether a lower court decision contradicts Supreme Court precedent when evaluating a certiorari petition,<sup>73</sup> petitions seeking merely “error correction” are in practice rarely granted. Indeed, the justices themselves are quick to tell us this. For example, in a recent solo opinion, Justice Alito noted his agreement with the Court’s decision to deny certiorari despite strongly disagreeing with the decision under review on the merits, because “we are not a court of error correction.”<sup>74</sup>

The Court’s refusal to engage in error correction is part and parcel of its self-seized role as the arbiter of only the most important legal issues. As Carolyn Shapiro puts it, the Court

has cast itself not as a source of justice for individual litigants or the forum to correct aberrations in the application of law, but rather as providing the structure and guidance necessary for the lower courts to correct or avoid errors. Necessarily, then, the Court must sometimes forego involving itself in cases where, although the result may be wrong, the case presents no issues of larger concern.<sup>75</sup>

Though the Court occasionally summarily reverses to correct what it perceives as egregious errors—especially in certain areas of law<sup>76</sup>—such use of certiorari is rare, occurring only a handful of times in a term.<sup>77</sup> And the Court is especially reluctant to correct errors when the conflict with Supreme Court precedent involves a misapplied legal standard, as opposed to an incorrect statement of a pure legal issue: Rule 10 explicitly warns litigants that “[a] petition for a writ of certiorari is rarely granted when the asserted

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72. See Caldeira & Wright, *supra* note 68, at 1115–16 (analyzing the 1982 Term and concluding that petitions with at least one amicus brief were granted 36% of the time).

73. The Rule explicitly states that whether a state court decision “conflicts with relevant decisions of this Court” is a factor in granting cert. See SUP. CT. R. 10(c). Rule 10 also makes clear that certiorari is warranted if a circuit court decision has “so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power,” a category which presumably includes decisions that ignore binding Supreme Court precedent. See SUP. CT. R. 10(a).

74. *Martin v. Blessing*, 134 S. Ct. 402, 405 (2013) (Alito, J., respecting denial of certiorari).

75. Shapiro, *supra* note 6, at 279.

76. In recent years, the Court has appeared especially eager to overturn lower court decisions that failed to heed the limits on habeas relief for state prisoners in the Antiterrorism and Effective Death Penalty Act. See, e.g., *Woods v. Donald*, 135 S. Ct. 1372 (2015) (per curiam); *Parker v. Matthews*, 567 U.S. 37 (2012) (per curiam); *Hardy v. Cross*, 565 U.S. 65 (2011) (per curiam). For the best scholarly analysis of the Court’s recent summary-reversal practice, see William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 18–40 (2015).

77. Baude reports that between October Term 2005 and October Term 2013, there were on average 6.2 summary reversals per Term. Baude, *supra* note 76, at 22.

error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”<sup>78</sup>

The foregoing picture, to be sure, lacks some fine details. For example, we have glossed over the fact that certiorari standards vary somewhat from justice to justice. As Margaret and Richard Cordray have observed, records of the Court’s deliberations that have been made public show that different justices appear to weigh different considerations when voting on certiorari matters.<sup>79</sup> Whether justices vote to grant certiorari depends on their view of the Court’s role and their underlying judicial philosophy.<sup>80</sup> Despite these nuances, though, the picture of the process that we have sketched here—one in which splits and a couple of other proxies for importance dominate—is certainly adequate for present purposes. Having described how the process works, the next Section turns to normative evaluation.

#### B. *Problems with the Current Process*

The Court’s approach to its certiorari docket represents a number of compromises. The justices must spend significant time dealing with the cases they hear on the merits if they hope to get the right bottom line and to write strong opinions that will be useful to the lower courts. So some shortcuts for dealing with the vast quantity of certiorari petitions the Court receives each year are necessary. No critique of current arrangements can ignore the reality that the Court has a finite reserve of attention, and the Court cannot and should not spend it all at the screening stage. Nonetheless, there are reasons to worry that the justices may not always strike the right balance in deciding what to decide.

We focus on three different, but related, critiques. First, the current process—by focusing attention on a narrow subset of cases—deprives the Court of valuable information about what is happening in the lower courts. Second, the Court’s emphasis on particular criteria creates an accountability deficit, because lower courts realize that certain cases are effectively immune from Supreme Court review. Finally, the Court’s proxies for importance are imperfect and thus inevitably cause the Court to miss out on some issues that are of unquestionable importance.<sup>81</sup>

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78. SUP. CT. R. 10.

79. See Cordray & Cordray, *supra* note 71, at 418–22.

80. See *id.* at 422–49.

81. Our analysis here presumes a working theory of what the Court’s goals are with its case-selection process, but we have not tried to spell out that theory at any length. Instead, we rely on what we see as relatively uncontroversial assumptions about the purposes that the Court’s case-selection process might serve. For a richer discussion of the relationship between case selection and different models of the Court’s role, see Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENT. 221 (2016).

## 1. Information

There is little doubt that many of the cases that survive the certiorari crucible *are* legally important.<sup>82</sup> This makes sense. The Supreme Court's primary role is to decide the hardest and most important questions.<sup>83</sup> Paradoxically, though, the all-certiorari docket may diminish the Court's ability to get the right answers to important questions.

The problem is that the certiorari docket restricts the justices' knowledge of the legal landscape. It is hard to deny that, at least in some sense, Supreme Court decisionmaking constitutes lawmaking.<sup>84</sup> In deciding cases, the Court is not solely concerned with reaching the right outcome in the particular case at hand; an important part of its task is crafting doctrinal rules that will lead to good results in future cases. Information is an essential input to lawmaking. As Frederick Schauer notes, effective lawmaking requires a "sense of what the array of future events, disputes, and decision-making occasions will look like."<sup>85</sup> If they are to perform successfully, lawmakers must know something about the types of cases that their rules will control, and they must understand something about the distribution of those cases.<sup>86</sup> Outside the judiciary, lawmakers have many tools to learn about the type and distribution of cases that prospective rules will govern.<sup>87</sup> Judicial access to information is more circumscribed, since courts are typically barred from conducting their own nonlegal research.<sup>88</sup>

In theory, the courts' informational deficit could be offset by the experience of deciding cases over time, which exposes judges to information about the types and distribution of disputes involving particular legal rules. But the type and distribution information that a judge gleans from judging will be "correct" only if the cases that come before the judge are representative of

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82. Not all, of course. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1561 (2008) ("It is at the certiorari stage that many well-represented petitioners persuade the Court to grant review in cases that may not be particularly certworthy . . ."). As explained below, moreover, this does not mean that the certiorari process is good at identifying *all* important cases. It is not. See *infra* Section I.B.3.

83. See Raymond Lohier, *The Court of Appeals as the Middle Child*, 85 FORDHAM L. REV. 945, 951 (2016) ("The Supreme Court now tends exclusively to the most controversial and important questions of national law.").

84. Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power"*, 80 B.U. L. REV. 967, 994 (2000).

85. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 894 (2006); see also Schauer, *supra* note 6, at 83 ("In order to perform the latter task adequately, however, courts need to have some sense of the array of events that some putative rule, standard, policy, or test will control.").

86. Schauer, *supra* note 6, at 83–84.

87. This is particularly true of administrative agencies. See William Ortman, *Chevron for Juries*, 36 CARDOZO L. REV. 1287, 1295 (2015).

88. See Bhagwat, *supra* note 84, at 998–99; Schauer, *supra* note 6, at 83.

the disputes that the rule at issue governs. If the cases are skewed, so too will be the judge's understanding of the field.<sup>89</sup>

Therein lies the informational pathology of the certiorari process. Although empirical analysis has yet to provide a complete account of how the Supreme Court exercises its certiorari jurisdiction,<sup>90</sup> it is clear that the Court does not grant cases at random. Instead, as explained above, the justices prefer cases with certain characteristics—most notably, circuit splits, as well as petitions brought by the solicitor general.<sup>91</sup> As a result, the cases the Supreme Court hears are not a representative sample of any larger population of cases.<sup>92</sup> The mix of cases in the certiorari docket does not resemble the mix of cases in the federal circuits. It looks even less like the dockets of district courts or the universe of disputes—to say nothing of the universe of primary conduct—governed by the laws over which the Supreme Court has the ultimate say.<sup>93</sup>

Schauer documents the lack of representativeness in the Supreme Court's docket by considering school-speech cases, which are common in the lower courts but which the Supreme Court took up only four times in the four decades before Schauer's essay.<sup>94</sup> One of the four cases, Schauer explains, involved a bizarre fact pattern (a "BONG HiTS 4 JESUS" banner) that "was highly unrepresentative of the student speech cases that bedevil the lower courts," leading to an opinion that "provide[d] virtually no guidance to the courts that have to deal with student speech issues."<sup>95</sup> Putting the insight more generally, Carolyn Shapiro observes that the "the Court's current distance from the daily work of the lower courts may prevent Justices from 'fully appreciat[ing] how the particular issue fits into its larger

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89. To be sure, all but one of the current justices (Kagan) were circuit judges before being elevated to the Supreme Court. That surely gives them perspective about the work of the circuit courts at the time of their service. Yet the perspective is, for most justices, dated. Only two of the current justices (Sotomayor and Gorsuch) were circuit judges in the last ten years. As of 2017, on average (for the eight), roughly seventeen years have passed since their promotion. And only Justice Sotomayor ever served as a district judge.

90. LEE EPSTEIN ET AL., SETTING THE NATION'S LEGAL AGENDA: CASE SELECTION ON THE U.S. SUPREME COURT 1–2 (2005), <http://epstein.wustl.edu/research/cert.pdf> [<https://perma.cc/9BTB-9NFB>] ("Analyses of agenda-setting have burgeoned and, yet—despite the immense interest, the sheer amount of attention, the awards bestowed on books examining cert in part or in full, the deployment of clever research strategies, and the employment of sophisticated technologies—commentators do not agree on why Supreme Court justices make the agenda-setting decisions that they do.").

91. See *supra* notes 67–71 and accompanying text.

92. Victoria F. Nourse, Response, *Overrides: The Super-Study*, 92 TEX. L. REV. SEE ALSO 205, 209 (2014), <http://www.texaslrev.com/wp-content/uploads/2015/08/Nourse-92-SeeAlso.pdf> [<https://perma.cc/A768-UFCR>] ("The problem here is that Supreme Court decisions are unlikely to be a representative sample; they differ from standard appellate decisions along a number of dimensions.").

93. Schauer, *supra* note 6, at 84.

94. *Id.* at 81–82.

95. *Id.* at 82 (discussing *Morse v. Frederick*, 551 U.S. 393 (2007)).



setting.”<sup>96</sup> The internal mechanism for sorting certiorari petitions—the cert pool—exacerbates the problem. As she explains, “[T]he cert pool insulates the Justices themselves from the daily life of the lower courts, from the ordinary but perhaps quite messy areas of law that are litigated every day.”<sup>97</sup>

The result is an informational deficit. Certiorari cases provide the Court with limited information about how statutes, regulations, and even its own prior decisions play out in ordinary cases.<sup>98</sup> This has obvious consequences for the quality of the Court’s decisions in the certiorari (i.e., legally important) cases themselves.<sup>99</sup> It is perhaps unsurprising that across substantive areas, subject-matter experts accuse the Court of bungling its episodic forays into their domains.<sup>100</sup> Moreover, recent empirical research on district judges corroborates the common sense proposition that judges get better at deciding cases in a given area as they hear more cases.<sup>101</sup> Because it denies the justices access to accurate information about the type and distribution of cases that legal rules govern, the all-certiorari docket makes judicial learning of this sort less likely.<sup>102</sup>

96. Shapiro, *supra* note 6, at 329 (quoting Hellman, *supra* note 5, at 435 n.83); *see also* Bhagwat, *supra* note 84, at 993.

97. Shapiro, *supra* note 6, at 286.

98. To some extent, this informational deficit might be offset by the Court’s summary-reversal docket. *See* Baude, *supra* note 76, at 25. Perhaps in screening certiorari petitions for summary-reversal candidates, the justices glean useful information about the work of the lower courts generally. Yet given the small size of the summary-reversal docket, and its significant focus on discrete case types—especially, as Baude notes, cases that “ensure that lower courts follow Supreme Court precedents,” *id.* at 31—we doubt that this mechanism offers the sort of useful information that a lottery would.

99. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439, 1471–72 (2009) (“This knowledge [about the lower courts the Supreme Court monitors] should enable the Court to make better decisions as it goes about its business.”).

100. *See* Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 16–17 n.95 (2004) (“Many academic specialists feel that because judges are required by the very nature of their positions to be generalists, they simply *cannot* acquire the necessary expertise (i.e., the expertise held by an academic specialist) to master the intricacies of particular legal disciplines.”). Indeed, many scholars across a range of different fields have criticized the Court’s sporadic interventions. *See* David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 557 (2008) (family law); Schauer, *supra* note 6, at 81–82 (school speech); Nancy C. Staudt, *Agenda Setting in Supreme Court Tax Cases: Lessons from the Blackmun Papers*, 52 BUFF. L. REV. 889, 890 (2004) (tax); *see also* June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 3, 30 (2007) (“In the determination of parentage, the Court seems to take up a significant issue roughly once a decade, rendering an opinion that destabilizes existing law, and then departing the field.”).

101. *See* M. Todd Henderson & William H.J. Hubbard, *Judicial Noncompliance with Mandatory Procedural Rules Under the Private Securities Litigation Reform Act*, 44 J. LEGAL STUD. S87, S93 (2015) (finding support, in securities law context, for “learning account” of judicial behavior, pursuant to which “[j]udges gain knowledge with experience, either directly from cases that they work on, from other cases in their district, or from other sources”).

102. To be sure, under some judicial methodologies the kind of information discussed here is irrelevant to the judge’s task. If the judge’s role is solely to divine the original meaning of a text, facts about what is happening in the lower courts would be irrelevant to the judicial

## 2. Accountability

The conventional view of the federal judicial hierarchy posits the Supreme Court as the ultimate supervisor of the federal courts. In theory, as several political scientists put it, “the federal judicial hierarchy is designed to enable the Supreme Court, sitting at the system’s apex, to impose its collective will on lower federal judges.”<sup>103</sup> On this view, federal judges, and especially circuit judges, are accountable to the Supreme Court for their decisions.<sup>104</sup> In reality, though, the Supreme Court’s ability to monitor the judicial output of the federal circuits—not to mention the federal district courts the circuit courts supervise—is sharply circumscribed.<sup>105</sup> The Court can realistically review only a small fraction of circuit decisions, a fact that attenuates the accountability of circuit judges and affords them wide berth in adjudicating disputes and even, to an extent, charting the course of federal law.<sup>106</sup>

The federal judicial system’s lack of accountability at the circuit level is, at first cut, an apparently intractable function of the relative docket sizes of the circuits and the Court.<sup>107</sup> In a system where the circuit courts decide around 55,000 cases each year and the Court decides fewer than ninety,<sup>108</sup> the prospect of Supreme Court review in any given case is necessarily small. As Toby Heytens puts it, “[T]he Supreme Court simply lacks the capability to engage in any sort of monitoring of the vast majority of . . . appellate court decisions.”<sup>109</sup>

Nonetheless, the Supreme Court’s all-certiorari docket exacerbates the circuits’ accountability gap in two important ways. First, it is often easy for

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task. But, while some justices may put more or less emphasis on text and original meaning as compared to other factors, we are skeptical that any justices are so single-mindedly focused on text that information that they would be completely unaffected by information about the potential consequences of different legal rules for the lower courts.

103. Susan B. Haire et al., *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC’Y REV. 143, 143–44 (2003).

104. Cf. Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 381 (2004) (“For federal district judges, this intrabranch accountability relationship is vertical (review by a higher court), for Supreme Court justices it is horizontal (the collective vote of colleagues), and for circuit judges it is in both directions.”).

105. Jennifer Barnes Bowie & Donald R. Songer, *Assessing the Applicability of Strategic Theory to Explain Decision Making on the Courts of Appeals*, 62 POL. RES. Q. 393 (2009) (finding, through quantitative analysis and interviews with circuit judges, that the threat of Supreme Court reversal is largely irrelevant to judges on federal courts of appeals).

106. Cf. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 14 & n.22 (1993).

107. *Id.* at 7; see also C. Arlen Beam, *Foreword*, 30 CREIGHTON L. REV. 655, 656 (1997) (noting the rarity with which circuit court judgments are reversed by the Supreme Court).

108. *Compare U.S. Courts of Appeals—Judicial Business 2015*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2015> [<https://perma.cc/3TEM-VTNT>], with SHAPIRO, *supra* note 52, at 63.

109. Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2055 n.40 (2008).

circuit judges to discern when a case has no prospect of Supreme Court review.<sup>110</sup> That is, circuit judges can often ascertain that a case lacks any novel or disputed legal question or high stakes for the nation's economy or politics. When that happens, the accountability isn't merely attenuated; it is nonexistent. Circuit decisions in such cases are both unaccountable and, relative to Supreme Court decisions, quite low profile. Scrutiny—by lawyers, scholars, and often the media—imposes a kind of accountability on virtually all Supreme Court decisions.<sup>111</sup> Much less so the decisions of circuit courts, which are often salient only to the litigants involved.<sup>112</sup> In practical terms, this means that circuit judges are free to dispose of cases with brief, unpublished judgments containing little or no reasoning. As many scholars have documented, *per curiam* judgments of this sort have been on a steady rise in the circuit courts over recent decades.<sup>113</sup>

Second, the Court's all-certiorari docket makes it possible for circuit judges to insulate their decisions by (consciously or not) making them appear unimportant. This further weakens the accountability of circuit judges for their decisions. There are two principal strategies. One is to decide cases on grounds unlikely to attract the Supreme Court's interest. There is empirical evidence that, at least in some contexts, circuit judges insulate decisions that advance their ideological priors by deciding them on grounds that are unlikely to interest the Supreme Court. Joseph Smith and Emerson Tiller analyzed circuit decisions in EPA cases, which can be decided either (and here we simplify the issues greatly) on grounds unattractive to the Supreme Court—did the EPA act arbitrarily and capriciously?—or on statutory interpretation grounds more likely to garner the Court's attention.<sup>114</sup> Smith and

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110. See Bowie & Songer, *supra* note 105, at 397 (“Most of the judges [interviewed] indicated that for at least a majority of the cases they heard, they were confident that the Court would not grant cert, but for the remainder of their docket, it was difficult to predict which cases would go up and which would not.”); *id.* (noting that one circuit judge stated that “he did not know which cases would be reviewed, but he was pretty confident about some of the types of cases that would not be reviewed,” and specifically identifying “criminal cases that turn on the facts” as an example); see also Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1223 (2009) (“[E]ven trial courts and courts of appeals make unsupervised decisions in particular contexts, as with . . . cases that are clearly not certworthy.”).

111. Cf. Tom Goldstein, *The Transformation of Legal Journalism*, 66 U. CIN. L. REV. 895, 899 (1998) (noting that the Supreme Court is “by and large . . . the only appellate court that has ever received serious coverage”).

112. Diane P. Wood, *Justice Harry A. Blackmun and the Responsibility of Judging*, 26 HASTINGS CONST. L.Q. 11, 13 (1998) (“In the courts of appeals, with very minor exceptions, our appellate jurisdiction is mandatory, and we hear hundreds (if not thousands) of cases every year that are of interest only to the immediate litigants.”).

113. See, e.g., Penelope Pether, *Strange Fruit: What Happened to the United States Doctrine of Precedent?*, 60 VILL. L. REV. 443, 446 (2015).

114. Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61 (2002). Smith and Tiller explain that statutory interpretation decisions are more likely to attract Supreme Court review because of their “high policy impact and decision transparency.” *Id.* at 65. “Reasoning process” cases, by contrast, have a “policy impact” that is “more limited.” *Id.* at 66.

Tiller found statistically significant evidence that the courts' choices were influenced by their ideological priors.<sup>115</sup> That is, panels were more likely to rule on process grounds, thereby reducing the chance of Supreme Court review, when their decisions accorded with their ideological preferences than when they did not.<sup>116</sup> The second strategy is perhaps more pernicious. By resolving unsettled legal questions in unpublished—and therefore nonbinding—opinions, circuit judges can “sweep” important decisions “under the rug,”<sup>117</sup> as Judge Patricia Wald has described the practice.<sup>118</sup> Having declared its opinion nonprecedential, the circuit ensures that its decision does not create a split of precedent worthy of Supreme Court review, making certiorari “even more remote than usual.”<sup>119</sup> While “decision sweeping” is hard to measure quantitatively, anecdotal evidence is not difficult to find,<sup>120</sup> and at least one Supreme Court justice—Justice Thomas in a dissent from the denial of certiorari—has accused a circuit court of using unpublished dispositions to evade review.<sup>121</sup>

### 3. Imperfect Proxies

The Court relies on proxies to determine whether a case is worth granting. Whether there is a split, whether the solicitor general has requested certiorari, which lawyers or firms are listed as counsel, the number of amicus briefs—all these are facts that the Supreme Court appears to find relevant.<sup>122</sup> But these proxies are only indirect markers—not direct measures—of importance. Presumably the solicitor general only asks the Supreme Court to grant certiorari if the SG thinks the case is important—but the case is not important simply because the SG has filed a petition.

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115. *Id.* at 71–72.

116. *Id.* at 72.

117. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995) (“We do occasionally sweep troublesome issues under the rug, though most will not stay put for long.”). Judge Richard Arnold agrees. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 223 (1999) (“[I]f, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug.”).

118. David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1680 (2005) (“The widespread use of unpublished, nonprecedential opinions provides incentives to appellate judges to insulate from en banc and Supreme Court review decisions that are controversial, unpopular, deviate from or even conflict with circuit precedent, or are inconsistent with the judge’s ideological views.”).

119. *Id.* at 1684.

120. *See id.* at 1685–89 (cataloging cases in which judges “intentionally cho[se] to duck some inconvenient issues”).

121. *See Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari) (“It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit.”).

122. *See supra* Section I.A.

With respect to splits in particular—probably the most important factor in granting certiorari—whether lower courts disagree on a particular legal issue is an especially imperfect proxy for importance. Perhaps the strongest argument for the emphasis on splits is premised on the view that uniformity of federal law is an important goal. A split means that federal law, for all practical purposes, has ceased to be uniform in some respect throughout the United States. To the extent that nonuniformity is an evil to be avoided, then resolving splits serves important social goals. Yet as Amanda Frost has argued, the common wisdom may significantly overvalue uniformity: “At least in some categories of cases, judicial disagreements over the meaning of federal law have few, if any, negative consequences.”<sup>123</sup> Frost argues that there is reason to doubt that the mere existence of a disagreement on a legal question between different circuits will significantly impair the law’s legitimacy or its predictability; nor will such a conflict necessarily place an intolerable burden on multistate actors.<sup>124</sup>

We need not resolve whether Frost has the better of this argument, though. Even those who value uniformity more than Frost must concede that it is only one goal among many. While ensuring uniformity may be one part of the Supreme Court’s job, there are other valuable goals case selection can promote: ensuring that the lower courts are being faithful to the Constitution and Acts of Congress, preventing bad policy results, enforcing limits on federal interference with state concerns, providing fair process for litigants, ensuring that remedies are available for serious violations of rights, and so on. Different people will have different views of the Supreme Court’s job, but few would take the position that resolving splits for the sake of uniformity is the only purpose of the institution. (If so, why not just use coin flips to settle the matter whenever a split arises?)<sup>125</sup>

Justifying the emphasis on splits, then, requires believing that the existence of a split is a good proxy for whether the issue implicates other important values. Perhaps the most important legal issues are the most difficult ones, and thus the ones most likely to engender conflict in the lower courts. Or, perhaps, given the Court’s current focus on splits, circuit court judges will be more inclined to create splits—and to increase the risk that the Supreme Court will reverse their decisions—if the issue is one that really matters. Or perhaps the issues that arise most frequently in the lower courts are those most likely to produce splits, simply because there are more opportunities for splits to arise.

The problem with this rationale, however, is that the correlation between conflict and importance seems weak. Often, splits regarding a particular statute arise because the statute is badly drafted—not because cases

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123. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1570 (2008).

124. See *id.* at 1584–601.

125. See Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422, 427 (2012) (“If the Justices were so inclined, they could decide cases by coin flip instead of by briefing and oral argument. . . . If the Justices approached their decisions in this way, they would totally eliminate the bottleneck at the top of the American judiciary.”).

involving that statute are particularly important. To take one example, the Court has had to deal with numerous cases over recent years involving the meaning of the Armed Career Criminal Act (ACCA),<sup>126</sup> a federal criminal statute that imposes mandatory minimum sentences for certain repeat offenders. While the ACCA's applicability is of enormous importance to the defendant in a particular case, there is no reason to think that the ACCA is much more important than any other particular legal niche to which the Court could have devoted the countless hours it has spent parsing the statute. Nonetheless, splits are the currency of the certiorari process, and the ACCA seems to have been particularly effective at creating splits.<sup>127</sup>

Splits can also arise over where the law is particularly technical or complex. Consider a case argued at the Supreme Court in October Term 2016. In *Manrique v. United States*, the Court considered “[w]hether a notice of appeal filed after a district court announces its sentence, but before it amends this sentence to specify a restitution amount, automatically matures to perfect an appeal of the amended judgment.”<sup>128</sup> While this issue created an apparently significant circuit split,<sup>129</sup> and while the legal issue appears to be genuinely difficult (indeed, the justices took more than six months before issuing an opinion over a dissent from Justice Ginsburg),<sup>130</sup> one wonders whether the resolution of this question was really a matter of pressing national importance. (Notably, the case attracted zero amici,<sup>131</sup> which indirectly demonstrates its apparent lack of national importance.) How many people will the Court's ruling on this question actually benefit?<sup>132</sup> It is hard to say, but the Supreme Court's emphasis on splits short-circuits the need to even ask this question.

Even if we are right that some splits are not particularly important, it could still be true that most important issues involve splits. The thinking

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126. Armed Career Criminal Act, 18 U.S.C. § 924(e) (2012); e.g., *Sykes v. United States*, 564 U.S. 1 (2011); *Chambers v. United States*, 555 U.S. 122 (2009).

127. The ACCA will be somewhat less prone to creating splits going forward; in 2015, the Court declared that the ACCA's “residual clause”—which had been the source of some, but not all, of the Court's granted ACCA cases—was unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). For a thorough analysis of the implications of the *Johnson* decision, see Leah M. Litman, *Resentencing in the Shadow of Johnson v. United States*, 28 FED. SENT'G REP. 45f (2015), and Leah M. Litman, *Residual Impact: Resentencing Implications of Johnson's Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55 (2015), <http://columbialawreview.org/wp-content/uploads/2016/03/Litman.pdf> [https://perma.cc/RF3L-S92D].

128. Brief of Petitioner at i, *Manrique v. United States*, 137 S. Ct. 1266 (2017) (No. 15-7250).

129. Petition for Writ of Certiorari at 13–18, *Manrique*, 137 S. Ct. 1266 (No. 15-7250).

130. See *Manrique*, 137 S. Ct. 1266.

131. See *Manrique v. United States*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/manrique-v-united-states/> [http://perma.cc/YRH4-J4ET].

132. To be sure, having a settled rule on this question is necessary so that litigants can know how to perfect their appeals, but there is little reason to think that a *national* rule—as opposed to circuit-specific rules, which would persist in the absence of Supreme Court resolution—is really all that necessary.

would go as follows: on close issues of real importance with strong arguments on both sides, at least one circuit court will be willing to break with the pack and create a split; only where the answer to a legal question is easy will no splits arise. But here, too, there is reason for skepticism. The problem is that with respect to some issues, the circuit courts could coalesce around a position that is incorrect—at least insofar as correctness is defined as how the Supreme Court would decide the issue if confronted with it.

Consider two related examples. In 1987, the Court decided *McNally v. United States* and concluded that the federal mail fraud statute does not extend to schemes to deprive others of intangible rights, “such as the right to have public officials perform their duties honestly.”<sup>133</sup> In so holding, the Supreme Court rejected the approach that had been taken by every single court of appeals over a period of decades.<sup>134</sup> The issue in *McNally* was of significant importance—whether the mail fraud statute extended as far as the government argued had significant implications for the power of federal prosecutors to regulate state government officials and various forms of private malfeasance. Yet the issue took decades to reach the Court because no split arose.<sup>135</sup>

Amazingly, this problem repeated itself: in the wake of *McNally*, Congress enacted a new statute confirming that the mail fraud statute extended to schemes involving deprivations of “the intangible right of honest services.”<sup>136</sup> Over the next two decades, the lower courts upheld various convictions under this statute, often approving broad theories of criminal liability similar to those that had proliferated in the lower courts before *McNally*.<sup>137</sup> Although the lower courts did not seem to consistently agree in their approaches, clear splits were slow to emerge. Finally, in 2009, the Court (largely through the persistence of Justice Scalia)<sup>138</sup> got interested in the issue. The decision that ultimately emerged, *Skilling v. United States*, pared § 1346 down far beyond what any of the lower courts had done, to apply to only bribes and kickbacks.<sup>139</sup> While the circuit courts had disagreed on the meaning of § 1346, none had concluded that it covered only bribes and

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133. 483 U.S. 350, 358 (1987).

134. *McNally*, 483 U.S. at 358.

135. See *id.* at 362–64 (Stevens, J., dissenting).

136. 18 U.S.C. § 1346 (2012).

137. See, e.g., *United States v. Hasner*, 340 F.3d 1261, 1271 (11th Cir. 2003) (holding that public officials commit honest-services fraud when they take official action without disclosing a conflict of interest); *United States v. Frost*, 125 F.3d 346, 363–69 (6th Cir. 1997) (upholding convictions of defendants on theory that they schemed to deprive the University of Tennessee of the honest services of its employees by helping students to receive advanced degrees through plagiarism).

138. In 2009, Justice Scalia wrote a dissent from denial of certiorari that pointed out the breadth of the lower court case law. See *Sorich v. United States*, 555 U.S. 1204, 1205–06 (2009) (Scalia, J., dissenting from denial of certiorari). Several months later, the Court agreed to hear several cases about the scope of honest-services fraud. E.g., *Skilling v. United States*, 558 U.S. 945 (2009).

139. 561 U.S. 358, 408–09 (2010).

kickbacks and nothing else. Twice, then, with respect to basically the same issue, the lower courts and the Supreme Court significantly disagreed on the meaning of an important legal provision. And while the Court did eventually resolve the issue, nearly two decades elapsed between *McNally* and *Skilling*.

This problem is not isolated. Not infrequently, the Supreme Court resolves an important legal issue in a way that differs from the consensus in the lower courts. Consider *Kiobel v. Royal Dutch Petroleum*.<sup>140</sup> There, the plaintiffs were former residents of Nigeria who alleged that the defendants, several foreign corporations, violated international law by aiding and abetting the Nigerian government in atrocities committed in retaliation for environmental protests.<sup>141</sup> The Court granted certiorari to resolve whether corporations could be sued under the Alien Tort Statute (ATS),<sup>142</sup> an issue on which the circuit courts had divided.<sup>143</sup> Yet when the Court examined the case closely, it zeroed in on a different legal issue. After oral argument, the Court requested additional briefing and argument on whether the ATS “allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”<sup>144</sup> The Court subsequently answered that question in the negative.<sup>145</sup>

In doing so, the Court rejected the views of the lower courts, which had uniformly held or assumed that the ATS could apply extraterritorially.<sup>146</sup> Had the split on the corporate liability issue—an orthogonal question—not arisen, one wonders when or how the Court might have confronted the extraterritoriality problem that all the lower courts had missed or ignored. And then one must wonder how many other similar issues are out there—legal questions on which the Supreme Court would disagree with the consensus approach in the lower courts, but which the Court never even notices unless they happen to come up in cases granted to resolve other circuit splits.

Of course, if the Court almost always agreed with circuit court consensus, this problem would seem more theoretical than real. But in fact, the Court regularly disagrees with the common wisdom in the lower courts. Aaron-Andrew Bruhl’s recent study of “lopsided” splits (those with several more circuits on one side of the issue) during October Terms 2010–2012 concluded that the Court sided with the majority view in thirteen of twenty-

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140. 133 S. Ct. 1659 (2013).

141. *Kiobel*, 133 S. Ct. at 1662–63.

142. 28 U.S.C. § 1350 (2012).

143. See Petition for Writ of Certiorari at i, 18–21, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

144. See *Kiobel v. Royal Dutch Petroleum*, 565 U.S. 1244 (2012) (ordering reargument on this issue).

145. *Kiobel*, 133 S. Ct. at 1669.

146. See Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 10 & n.2, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).



one (or 62%) of cases.<sup>147</sup> Certainly, these statistics show that the Court often agrees with lower court consensus—but also that rejecting that consensus is not particularly unusual either. (Indeed, as Bruhl put it, “[P]erhaps the headline is that the Court *disagrees* with lopsided lower-court majorities so often.”)<sup>148</sup> In fact, in addition to *Kiobel*, the study identified three other cases where the Court took a position that no circuit court had adopted.<sup>149</sup> Moreover, these statistics almost certainly undercount the number of cases where the Court rejected a lower court consensus because the study limited its count to cases where the Court itself described the state of lower court jurisprudence in its opinion.<sup>150</sup> If it is not particularly rare for the Court to take a position that most circuit courts have rejected—or even that no circuit court has adopted—then it is at least plausible that there are a number of situations where the Court might do the same if it had occasion to resolve the issue.

Yet those occasions might never arise in a world where splits are certiorari’s main currency. The problem is that, even with respect to unquestionably important issues, herding behavior is likely to prevent splits from arising; circuit courts often follow each other, rather than independently evaluating the arguments. Where, say, five circuits have interpreted a statute one way, the sixth to confront the statute may be particularly hesitant to go the other direction.<sup>151</sup> This may be because the judges on the panel assume the other circuits interpreted the statute correctly, or because they secretly disagree but do not want to risk the embarrassment of reversal (knowing that splits make Supreme Court review more likely). Regardless of the reason, the effect is the same: a cascade that can result in a circuit consensus that the Supreme Court, if it had the opportunity to resolve the question, would reject.

Beyond the problem of cascades, splitless-but-erroneous circuit court rulings can also result from specialized venue rules and even from the substantive law itself. Consider petitions to review regulations promulgated by administrative agencies. When an agency regulation is challenged in multiple circuits, the cases are consolidated in one court, selected at random from among those with a pending petition.<sup>152</sup> By definition, no circuit split can thereafter emerge (at least at the pre-enforcement stage) on the lawfulness of

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147. Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 901 (2014).

148. *Id.* at 903.

149. *See id.* at 901.

150. *See id.* at 904–09 (describing the study’s methodology). Indeed, looking “beyond the four corners of the opinions,” the author himself identified other examples where the Court took a position no circuit court had adopted. *See id.* at 906–07.

151. Scott Baker and Anup Malani have shown that, as each additional circuit reaches the same conclusion as to a disputed legal issue, the next circuit to confront that legal question becomes more likely to follow the pack. *See* Scott Baker & Anup Malani, *How Do Judges Learn from Precedent?* 22 tbl.6 (Nov. 18, 2015) (unpublished manuscript), [http://www.law.columbia.edu/sites/default/files/microsites/law-economics-studies/20151118\\_how\\_do\\_judges\\_learn\\_from\\_precedentbakermalani.pdf](http://www.law.columbia.edu/sites/default/files/microsites/law-economics-studies/20151118_how_do_judges_learn_from_precedentbakermalani.pdf) [<https://perma.cc/4V8S-YVU6>].

152. 28 U.S.C. § 2112(a)(3) (2012).

the regulation.<sup>153</sup> Similarly, when the substantive law governing a topic is infused by standards, rather than rules, circuit splits are unlikely.<sup>154</sup> Rule 10 makes clear that at the certiorari stage, the Court cares much more about how the lower court defines the governing standard, not how the court applies that standard to the facts of a case.<sup>155</sup> Carolyn Shapiro argues that this explains the Supreme Court's lack of useful guidance on employment discrimination.<sup>156</sup> Likewise, when a law applies to a geographically limited area (i.e., when its application is confined within a single federal circuit), no splits will appear.<sup>157</sup> Matthew Fletcher argues that many claims brought by American Indian tribes fall into this category, and that they are accordingly underrepresented on the Supreme Court's docket.<sup>158</sup>

The central problem, as we see it, is that the heavy focus on splits means that the Supreme Court may never even realize when its help is most needed. If, for example, the lower courts have reached consensus on an incorrect interpretation of law, the Court will likely only ever confront the issue if it comes up indirectly in a case implicating some other split.<sup>159</sup> Or if there is widespread confusion about how to apply a settled legal standard to given facts, it is rare for the Supreme Court to grant certiorari and provide guidance—no matter how much that guidance might be needed. “Neither the Court’s culture nor its certiorari criteria encourage a law clerk to say, ‘although all the lower courts agree on the appropriate standard for this area of law, the application of that standard is so inconsistent that Supreme Court involvement is warranted.’”<sup>160</sup> In short, the Court’s current practices ensure that it never seriously evaluates a wide range of splitless legal issues, even though those legal issues might be of significant importance.

### C. Previous Proposals for Reform

Just as we are not the first to identify pathologies in the certiorari process,<sup>161</sup> we aren’t the first to suggest an institutional reform. In fact, such proposals have proliferated in recent years.<sup>162</sup> Paul Carrington and Roger

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153. See William Ortman, *Rulemaking’s Missing Tier*, 68 ALA. L. REV. 225, 255–56 (2016).

154. See Shapiro, *supra* note 6, at 273–74.

155. See SUP. CT. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”); see also Shapiro, *supra* note 6, at 289.

156. Shapiro, *supra* note 6, at 296.

157. Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 957 (2009) (noting that circuit splits are rare in Indian law cases because the only possible split is usually between a state court and a federal circuit).

158. *Id.* at 956–57.

159. See cases discussed *supra* notes 133–146 and accompanying text.

160. Shapiro, *supra* note 6, at 285.

161. See *supra* Section I.B.

162. Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 20 (2011) (“In order to address some of the perceived problems with the Court’s

Cramton, for example, suggest creating a “certiorari division” composed of non–Supreme Court Article III judges to select cases for the Court’s docket.<sup>163</sup> Amanda Tyler argues for bringing back the “certification” process, whereby federal circuit courts could certify legal questions to the Supreme Court.<sup>164</sup> Tracey George and Chris Guthrie urge Congress to redesign the Supreme Court to make it work more like the U.S. courts of appeals, with more justices, decisions heard by panels, and an en banc procedure.<sup>165</sup> Richard Lazarus suggests adding senior lawyers to the Court’s staff to assist the justices and their clerks with case selection.<sup>166</sup>

But not all observers agree that tinkering with the Supreme Court’s docket is called for. Judge J. Harvie Wilkinson III of the Fourth Circuit has suggested that the critics are offering solutions in search of a problem.<sup>167</sup> There is no reason to think the Court needs more work, he contends, and moreover, “the world will not end because a few circuit splits are left unresolved.”<sup>168</sup> More fundamentally, Judge Wilkinson challenges the very coherence of the argument that the Supreme Court routinely errs in how it selects cases. “[I]f we cannot trust the Supreme Court’s judgment in deciding what to decide,” he asks, “how can we trust its judgment in deciding what it has decided to decide?”<sup>169</sup>

In this debate, we stand firmly with the reformers. Even someone who genuinely believes that the Court wisely decides cases on the merits can question current certiorari practices without contradiction. The Court’s approach to certiorari reflects a number of trade-offs. In its heavy reliance on imperfect proxies, the Court appears to have concluded that the justices’ limited time and attentions are best spent on the merits cases, not on gatekeeping. That may be an understandable compromise in light of the potentially unmanageable time commitment that full attention to the certiorari docket would require. But it does not prove that there are no ways that the Court’s case-selection procedures could be improved—especially if there are available methods for improvement that do not impose significant additional time constraints on the justices. And the proposals outlined above,

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current certiorari practices, numerous proposals for reform have been floated in the past few years alone.”).

163. Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 630–36 (2009).

164. Amanda L. Tyler, *Setting the Supreme Court’s Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1319–26 (2010). Craig Lerner and Nelson Lund go further, proposing a statute that would limit the number of certiorari cases on the Court’s docket to the number of cases certified by the circuit courts. Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court’s Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1289 (2010).

165. See George & Guthrie, *supra* note 99, at 1442.

166. Lazarus, *supra* note 7, at 97.

167. J. Harvie Wilkinson III, *If It Ain’t Broke . . .*, 119 YALE L.J. ONLINE 67, 67–68 (2010), [http://www.yalelawjournal.org/pdf/840\\_egpccc2c.pdf](http://www.yalelawjournal.org/pdf/840_egpccc2c.pdf) [<https://perma.cc/SGM8-PASM>].

168. *Id.* at 69.

169. *Id.* at 75.

and others like them,<sup>170</sup> at least have potential to serve as such improvements.

At the same time, however, we think the prior proposed reforms have all missed something significant. None of the proposals sufficiently addresses the biggest problems we see with the Court's case-selection process. Nearly all the proposals on the table accept—or are at least agnostic about—the idea that only truly important cases merit the Supreme Court's attention.<sup>171</sup> They focus instead on repairing flaws in the mechanisms used to identify and select such cases.<sup>172</sup> But that is not enough. The pathologies of the certiorari docket that we have described would exist even in a world where the Court was able to devote ten times as many hours ensuring it was following Rule 10 to the letter. We think the problem lies in the very premise that the Court should be trying to identify all, and only, the truly important cases to resolve on the merits. Our proposal, to which the next Part turns, rejects that premise—and thus could hold the key to solving the certiorari docket's major difficulties.

## II. THE LOTTERY DOCKET

This Part offers our proposal to improve the Supreme Court's case-selection process: the lottery docket. Section II.A sketches the outlines of the proposal, while bracketing the finer details as well as some practical concerns about implementation. Section II.B explains how the lottery docket would ameliorate the pathologies of the current certiorari process. Section II.C responds to several objections.

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170. See, e.g., Schauer, *supra* note 6, at 85–86 (considering possibility that litigants could provide more information about the “frequency and nature of litigation below”); Watts, *supra* note 162, at 42–68 (proposing incorporating administrative law principles).

171. To be sure, we are far from the first to suggest problems with this idea. See, e.g., Schauer, *supra* note 6, at 83–85; Shapiro, *supra* note 69, at 127. Only one of the recent institutional proposals, however, portends significant reform in this dimension. Tracey George and Chris Guthrie propose expanding the size of the Supreme Court to fifteen justices who would sit in panels. George & Guthrie, *supra* note 99, at 1475. They argue that this would, among other things, generate a more credible threat of review of circuit decisions and facilitate judicial learning at the Supreme Court level. *Id.* at 1469–81. George and Guthrie's innovative proposal would achieve some of the same benefits as our proposal, but—given its total redesign of the Supreme Court—at a substantially higher cost. Our proposal would be far easier to implement.

172. Lerner and Lund buck this trend by proposing “to reintroduce circuit riding into the life of the Supreme Court.” Lerner & Lund, *supra* note 164, at 1295. Requiring justices to sit each year as circuit or district judges, Lerner and Lund argue, would force them to “cope with many of the bread-and-butter issues that other federal judges confront daily.” *Id.* at 1299. We agree with Lerner and Lund that circuit riding would convey useful information to the justices about the quotidian work of the lower courts. Circuit riding would not, however, address the other pathologies at which the lottery docket is aimed. It would not force the Court, *as an institution*, to confront ordinary cases, and so would not improve decisionmaking at the circuit level. Nor would it be likely to help the Justices find the “missing cases” that evade certiorari.

### A. *The Proposal*

Our proposal is a simple one. We propose supplementing the Supreme Court's certiorari docket by giving the Court appellate jurisdiction over a new set of cases. These cases would be selected from the final decisions of the circuit courts<sup>173</sup> and entered into the lottery. At regular intervals—for sake of argument, say four times a year—a small number of cases would be chosen as “winners.” Once chosen, the losing party in the lower court would be granted the right to appeal.<sup>174</sup> The appeal would then proceed much like any other case in which the Supreme Court exercises mandatory appellate jurisdiction after probable jurisdiction is noted. The appellant would file an opening brief, the appellee a response brief, and so it would proceed.<sup>175</sup> Normal rules of forfeiture and waiver would apply, but otherwise the appellant could make any argument properly preserved in the court below. The Supreme Court, in turn, would be obliged to rule on the merits of the dispute—just as a circuit court panel would. Just like any other decision of the Supreme Court on the merits, the decision would be precedential.<sup>176</sup>

Described at this high level of abstraction, the reader is likely left with many questions. First, how could the proposal be implemented in the first place, and who could do it? One simple way would be for the Supreme Court to do so itself using its certiorari jurisdiction. It could simply decide to start granting a set number of certiorari petitions based on a randomized process rather than based on a detailed review of the substantive arguments. Given the unfettered discretion the Court possesses to dispose of certiorari petitions, there is no reason why it should lack the power to pick some petitions to grant through a random process.

This solution, though, is not ideal; one of the benefits of the lottery docket would be the way it would expose the Court to a more representative sample of cases in the lower courts. If eligible cases were limited to those in which petitions for certiorari were filed, that would reduce the proposal's ability to ameliorate the distortion. Perhaps the Court could address this

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173. We consider later whether this proposal could extend to decisions from state courts. See *infra* Section III.C.

174. Where the lower court decision goes against both parties in different respects, each party could have the right to cross-appeal, as often occurs with appeals to the circuit courts from district court rulings.

175. Briefing on the merits for cases set for argument—whether from the appellate docket or the certiorari docket—is governed by Supreme Court Rules 24 and 25. SUP. CT. R. 24–25.

176. Of course, *how much* precedential weight such a decision deserves is an open question. The Court has made clear that summary affirmances—as decisions on the merits of an appeal—are precedential decisions, though ones that are entitled to somewhat less weight than decisions with opinions. A summary affirmance “thus has ‘considerably less precedential value than an opinion on the merits.’” *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1800 (2015) (quoting *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180–81 (1979)). Our hope is that the Court would not merely summarily affirm, but would hear argument and write an opinion addressing the issues in depth. If so, we would also hope that the opinion would be entitled to just as much precedential weight as any other Supreme Court opinion.

problem by amending its rules to authorize a new form of certiorari petition. Rather than filing a lengthy, professionally printed, booklet-bound petition and pay a \$300 fee, as currently required,<sup>177</sup> the Court could permit lottery entrants to file a simple, one-page document declaring the petitioner's intent to enter the lottery.<sup>178</sup>

Perhaps a simpler way, though, would be for Congress to add a new class of Supreme Court appellate jurisdiction by statute. Congress could, perhaps, amend 28 U.S.C. § 1254. That section currently provides that “[c]ases in the courts of appeals may be reviewed by the Supreme Court”<sup>179</sup> using certiorari or certification; it would be simple enough to add a new subsection laying out the terms of the lottery proposal. Once a court of appeals denied an en banc petition, or the time for filing that petition expired, the case would become eligible for the lottery. The case would then either automatically be entered into the lottery or be entered upon filing a document like a notice of appeal; we address this complexity later.<sup>180</sup>

A second question concerns how many lottery-docket cases the Court should hear each year. Our view is that the Court should hear enough new cases so as to meaningfully increase the likelihood that the Court will be exposed to a wide range of issues, at least over a multiyear period—but not so many new cases that the Court feels overwhelmed by the influx. Avoiding that latter risk is especially important: there is a danger that the Court could start to treat its mandatory appellate jurisdiction over the lottery cases as if they were part of its certiorari jurisdiction. That is, the concern is that the Court would simply issue summary affirmances without seriously evaluating the merits.<sup>181</sup> Although one would hope that the precedential nature of an affirmance (unlike a certiorari denial) would provide some safeguard against such cavalier use of summary disposition, it is no guarantee. In the past, when the Court has been overwhelmed by its appellate docket, it has proven willing to use summary tools to dispose of cases even where more careful treatment would have been appropriate.<sup>182</sup>

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177. See SUP. CT. R. 33.1 (requiring booklet format for petitions for certiorari, among other filings); SUP. CT. R. 38(a) (setting out fee “for docketing a case on a petition for a writ of certiorari”). Booklet format and filing fees are not required for *in forma pauperis* petitioners. See SUP. CT. R. 39.3 (noting that *in forma pauperis* petitioners may generally file documents under Rule 33.2, which governs plain-paper format filing); SUP. CT. R. 39.4 (stating that documents properly filed by a party proceeding *in forma pauperis* “will be placed on the docket without the payment of a docket fee or any other fee”).

178. The Supreme Court has the authority to set its own fees, 28 U.S.C. § 1911 (2012), and so we see no reason why the Court could not state by Rule that parties could enter the lottery without paying any filing fee.

179. *Id.* § 1254.

180. See *infra* Section III.A.

181. See *supra* note 55 and accompanying text.

182. See Linzer, *supra* note 31, at 1293 (“[O]n a number of occasions the Court, without comment, has summarily disposed of appeals raising issues that certainly were unclear under the existing case law.”).

While we do not have an exact number in mind, in our view perhaps twenty to forty lottery cases each year would strike the right balance between competing considerations. That number would be few enough that the Court could, if it were willing, give each case full-dress treatment, with an hour-long oral argument and detailed discussion at conference. Many more than that, and it becomes likelier that the Court would cut corners on the lottery cases so as to have more time to focus on the certiorari docket. But given that the Court seemed able, as recently as the 1980s, to hear more than 150 cases a year,<sup>183</sup> we think adding a few dozen to the current caseload of seventy to eighty would impose no great burden.

It is also possible that the Court would reduce the number of certiorari petitions granted to compensate for the new lottery cases, in which case the lottery docket would impose no additional time constraints. One might ask whether a reduction in the certiorari docket would be a social cost. But given our skepticism about the correlation between splits and importance, we do not think it is likely that this cost is significant. That is especially the case given that the most important splits—ones that recur on a regular basis—will by their nature arise again and again, giving the Court more opportunities to resolve them.

Without question, however, the success of this proposal depends on the willingness of the Court to play along. Simply giving the Court jurisdiction over a new set of cases is inadequate to guarantee that the Court will take those cases seriously. And it is critical that the Court take the lottery docket seriously: if the justices just go through the motions and pay little attention to the merits of the cases so that they can focus on the hot-button constitutional cases instead, the proposal is unlikely to do much good. (One troubling scenario is that the Court might just summarily affirm all the cases on its lottery docket. A potentially worse scenario would occur if the Court distorted justiciability doctrines to rid itself of unwanted lottery cases.) For this reason, getting some buy-in from the Court, or even getting the Court to adopt the proposal itself, rather than foisting it on the justices unwillingly, is absolutely critical for its success.

Why might the Court agree to the lottery docket? In our view, its benefits—which we describe in detail below—are all benefits that the Court itself should desire. The justices want to know what is happening in the lower courts, they do not want the lower courts to ignore their precedents, and they want to settle important questions. If the Court were convinced that the lottery docket would lead to these benefits, without imposing too many costs on the Court's ability to deal with the certiorari docket, we think the justices could very well embrace the proposal—or at least tolerate it if nothing else.

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183. See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1229 fig.1 (2012).

## B. Benefits

Supplementing the Court's certiorari docket with a lottery docket would, particularly in the long run, counteract the informational, accountability, and missing-cases pathologies of certiorari described above. While it would not correct them entirely, we proceed on the premise that incremental change is worthwhile. The perfect must not be the enemy of the good.<sup>184</sup>

### 1. Better Information

The lottery would expose the Court to cases that quite simply it would otherwise never see. The Court would have to decide the issues the cases presented, regardless of whether the issue is important or trivial. The Court would be confronted with summary judgment appeals, run-of-the-mill evidentiary disputes, sufficiency challenges to criminal convictions, motions to reduce damages awards, and everything else in between. Many of these issues are ones that the Court would have no interest in confronting if limited to its certiorari jurisdiction.

Over time, this would expose the Supreme Court justices to a wider spectrum of federal litigation. Because the lottery docket would be more representative of the workload of the circuit courts,<sup>185</sup> deciding these cases would educate the Court about the types and distribution of disputes that occupy the federal courts—at least at the circuit level<sup>186</sup>—yielding more of the kinds of information that is needed for crafting effective rules.

Randomization is an oft-used tool of information acquisition, especially in the sciences.<sup>187</sup> This is in part because, as Adam Samaha observes, random samples from a population of interest “can be studied at lower cost than can the entire population.”<sup>188</sup> It is impossible for the Supreme Court to review a significant percentage of circuit decisions.<sup>189</sup> Nonetheless, because the circuits' caseload contains type and distribution information useful to Supreme Court lawmaking, the universe of cases decided by federal courts is—or should be—a population of interest to the Supreme Court. Examining a random sample of those cases would give the Court otherwise impossible-to-access information about the full population. To be sure, many lottery-docket cases would not be independently significant to anyone other than the litigants. Their informational value would not be in creating precedent

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184. Cf. Voltaire, *La Begueule*, in 3 RECUEIL DES MEILLEURS CONTES EN VERS 77, 77 (London, n. pub. 1778) (“[L]e mieux est ennemi du bien . . .”).

185. Just how closely depends on lottery mechanics we discuss *infra* in Sections III.A–III.B.

186. Below, we explore how the lottery mechanism could be deployed so that the docket resembles the workload of district courts. See *infra* Section III.B.

187. See Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 23–24 (2009).

188. *Id.* at 23.

189. See Posner, *supra* note 106, at 14 n.22.



directly, but in helping the Court craft good law when legally important questions do reach it for decision.

We recognize, of course, that the proposal we have offered is insufficient to eradicate the Court's information deficit completely. Adding several dozen lottery-docket cases to the Court's caseload is certainly not enough to give the Court a complete sense of federal litigation generally. And even if the Court could hear enough lottery cases to have a fully representative sample of what is happening in the *circuit* courts, that would not fully inform the Court of what is going on in the *district* courts, since not all adverse district court rulings are appealed.<sup>190</sup>

Nor would a representative docket give the Court *all* of the critical information it needs. Choosing an appropriate legal rule, at least if one's methodology is sensitive to consequentialist considerations, requires a sense of how many people that rule will benefit, how many people it will harm, and the magnitudes of the costs and benefits.<sup>191</sup> Case-by-case adjudication is simply not the optimal procedure for producing that kind of information.<sup>192</sup> All this said, however, exposing the Court to a wider swath of cases would unquestionably give it more information from which to make decisions, even if it would not give the Court perfect information. And reducing the Court's information deficit strikes us as an important goal even if eliminating that deficit is impossible.

## 2. Tighter Accountability

The lottery docket would also counteract certiorari's accountability gap. As described above, because of the all-certiorari docket, circuit judges often know that they are a case's last stop, weakening the accountability of circuit judges for their rulings.<sup>193</sup> Not so with a lottery docket in place. Every case, no matter how seemingly quotidian, would be a candidate for review. The chance that a particular case will "win the lottery" would, of course, be small, given the inevitable chasm between the number of cases the circuits decide and the size of any plausible lottery docket. But—unlike in the current system—no case would be categorically exempt from review.<sup>194</sup>

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190. One way to address this particular problem is through a weighted lottery, which we consider *infra* in Section III.B.

191. See Schauer, *supra* note 85, at 893–94 ("Any rulemaker . . . is explicitly or implicitly engaged in a process of surveying the future and imagining the field of decisions to be governed by the putative rule. . . . [A] necessary component of any rulemaking is the process of trying to get a sense . . . of what the array of future acts, events, disputes, and decisionmaking occasions will look like.").

192. See, e.g., Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215, 227 (1994) ("The application of cost-benefit techniques requires more information about cost than courts usually possess.").

193. See *supra* Section I.B.2.

194. The accountability benefit of the lottery docket is an example of a downstream incentive effect of randomized decisionmaking. See generally JON ELSTER, SOLOMONIC JUDGEMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY 68–69 (1989).

The effectiveness of an accountability regime is a function of the probability that an agent will be sanctioned for poor performance and the seriousness of the sanction.<sup>195</sup> There is some reason to think that lottery-docket reversals would be more costly to circuit judges (and thus a more serious sanction) than reversals in cases decided on certiorari. Much evidence suggests that circuit judges do not mind being reversed on certiorari. As Richard Posner explains, “aversion to reversal” is “fairly unimportant” to circuit judges in part because “most [reversals] reflect differences in judicial philosophy or legal policy rather than mistake or incompetence by the appellate judges.”<sup>196</sup> An anonymous circuit judge interviewed by political scientists Jennifer Bowie and Donald Songer agreed: “If they do review and they see it differently, so be it—it is their job after all to make law.”<sup>197</sup> Bowie and Songer’s quantitative analysis of circuit court decisionmaking further corroborates that fear of reversal does not significantly motivate circuit court decisionmaking.<sup>198</sup>

The perception by circuit judges that reversal is not embarrassing may be exacerbated by the fact that most cases that the Supreme Court decides are extremely close questions. Indeed, the fact that reasonable minds can disagree on a legal question is often the reason why the case creates a split that gets the Supreme Court’s attention. If, by contrast, the Supreme Court reverses the lower court for committing an elementary error, the reputational costs of reversal may be higher.<sup>199</sup>

Thus, we suspect that the circuit judges’ calculus might be different under a lottery docket. Being reversed in a case that reached the Supreme Court by lottery would ordinarily not mean that the justices merely made different value judgments than the panel below, or that they came up with a different answer to an extremely close legal question that divided the lower courts. It could instead indicate that the circuit court was sloppy or careless in its analysis of the case. That would be embarrassing in a way that certiorari reversals are not.<sup>200</sup> As Bowie and Songer’s anonymous judge told them, “[T]he only thing that would embarrass me to my colleagues is if I hadn’t done a good job—if my analysis were sloppy or if I had missed an important case.”<sup>201</sup> That lottery-docket reversals would impose reputational costs for

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195. Cf. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–79 (1968).

196. Posner, *supra* note 106, at 14–15.

197. Bowie & Songer, *supra* note 105, at 405.

198. *Id.* at 398–403.

199. Although we are unaware of any research on this question, it may be that circuit judges are more sensitive to being summarily reversed than to being reversed after briefing and oral argument. Unlike an ordinary reversal, summary reversals are usually reserved for situations where the lower court makes an error as to clearly settled law.

200. See Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1627 (2000) (noting that random selection of panel decisions for en banc review “might lead judges to take more care with routine cases, since it would be embarrassing to be reversed on one, particularly if the panel’s treatment of the issues was cursory”).

201. Bowie & Songer, *supra* note 105, at 405.

circuit judges is—obviously and necessarily—only a hypothesis, but it finds support in empirical analysis by Stephen Choi, Mitu Gulati, and Eric Posner suggesting that district courts are influenced by the threat of reversal.<sup>202</sup> Why this difference between district and circuit judges? We suspect that, in part, it is because district judges cannot shrug off reversals as the product of different value judgments or reasonable disagreement on a particularly thorny legal issue.

To be sure, even with a lottery docket, the chance that a sloppy circuit court decision would be reversed will remain far lower than the chance that a sloppy district court decision would be reversed. But here, it is comparative, not absolute, judgments that matter. Reversal is the Supreme Court's only tool to maintain the accountability of lower court judges, and the current regime makes it irrelevant for most cases. For many cases, the probability of reversal is effectively zero. Under our proposal, the probability of reversal, while still small, is greater than zero for all cases—and that is an improvement from the status quo.

### 3. More of the Important Issues

Thus far, we have argued that the lottery docket would bring the Court some seemingly unimportant cases in the hopes of producing better systemic results. But we do not mean to suggest that every lottery-docket case would be unimportant in its own right. Indeed, one benefit of the proposal is that it could actually bring important cases before the Court that the Court would otherwise never see.

As argued above,<sup>203</sup> the proxies on which the Court relies in the certiorari process are—like all proxies—imperfect. And so there are likely some important issues that it would be helpful for the Supreme Court to decide but that never appear on the Court's radar. One principal aspect of the problem is that there are issues where the lower courts coalesce around one view without creating a split—but if the Supreme Court were to confront the issue, it might decide the case differently. Indeed, above we pointed to examples where issues took many years to reach the Court and where the Court ultimately rejected the consensus reached by the lower courts.<sup>204</sup>

Why might this occur? Consider how circuit court decisionmaking works. Circuit courts have high caseloads and consider issues in groups of only three judges. Some circuit panels, deciding issues of first impression, may devote significant time and effort towards getting the answer right. But sometimes a court may deal with an issue hastily and reach a result that, in an optimal decisionmaking environment, it might not have reached. As

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202. See Stephen Choi et al., *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 28 J.L. ECON. & ORG. 518, 543 (2012) (finding evidence that “[d]istrict judges, whatever their political orientation, decide cases in a politically biased way, albeit reflecting the political biases of the appellate judges rather than those of the district judges themselves”).

203. See *supra* Section I.B.3.

204. See *supra* Section I.B.3.

noted,<sup>205</sup> circuit courts have a tendency to herd: once one decides an issue, the next circuit to confront the same question is more likely to agree. That becomes more true as additional circuits join the herd.<sup>206</sup> Given time, it is quite possible for the circuits to reach consensus around the wrong—or suboptimal—position on a legal issue.

Why, then, might the Supreme Court be more likely to correct such mistakes? First of all, the Supreme Court does not seem subject to the herding phenomenon above—the Court does not seem particularly deferential to the views of lower courts, and not infrequently it sides with the “short” side of a circuit split.<sup>207</sup> But beyond that, the Supreme Court has a number of institutional advantages that make it more likely, as compared to the circuit courts, to reach the right answers to hard legal questions. Of course, in a trivial sense, all of its rulings are “correct” because the Court is the final authority on the meaning of federal law. But in our view, there is a sense in which the Court is likely to reach better answers to hard legal questions, as judged by conventional criteria—fidelity to text, “fit” with precedent, logical consistency, and so on. One does not have to fully embrace Ronald Dworkin’s right-answer thesis<sup>208</sup> to believe that—at least judged from the perspective of the governing norms of our legal system—there are *better* and *worse* answers to some legal questions.

And the Supreme Court is particularly well equipped to reach good answers. As compared to the circuit courts, it has more judges considering each case (nine<sup>209</sup> as compared to three), the average quality of which should be higher (assuming that justices are more distinguished than the average circuit judge, and that their distinction correlates with judicial quality); more time to spend on each case (the Court has a lighter merits caseload

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205. See *supra* note 151 and accompanying text.

206. In theory, many minds are more likely to get the right answer. The Condorcet Jury Theory holds that, if each decisionmaker has a greater than 50% probability of coming to a right answer, the majority view will be more likely to be correct as you factor in more decisions or votes. Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 4–5 (2009). That thesis does not hold, however, when the different decisions are linked—that is, where the second decisionmaker relies on the first, the third relies on the second, and so on. Under those circumstances, an “informational cascade” can occur. See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 720–24 (1999) (describing the general phenomenon of informational cascades).

207. See Bruhl, *supra* note 147, at 900–03 (describing study that showed that the Court often disagreed with the majority view of the circuits in “lopsided” splits).

208. See, e.g., Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978) (arguing that there are often right answers to disputed legal questions).

209. Or eight, as was the case for more than a year due to the death of Justice Scalia and the Senate’s refusal to vote on President Obama’s nominee, Merrick Garland. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html?mcubz=1> (on file with the *Michigan Law Review*).

than most appellate courts<sup>210</sup>); more experienced clerks;<sup>211</sup> more help from amici;<sup>212</sup> more experienced librarians;<sup>213</sup> and so on. These advantages make the Court well equipped to see where lower courts might have erred and to correct the errors and thereby improve the law.

But the Court cannot do this if it never gets a chance to confront the issues. Nor can the Court easily identify such splitless issues where its help might be needed. After careful study of an issue, with help of good briefing, amicus briefs, oral argument, and so on, the Court may be confident that the lower courts have erred. But at the certiorari stage, it is much more difficult to see that the lower courts have erred. Sometimes a justice will get invested in an issue and try to get his or her colleagues interested—as seems to have happened to Justice Scalia with honest-services fraud.<sup>214</sup> But many such cases will inevitably slip through the cracks.

We have no way of knowing how many such issues—where the Court would disagree with the consensus in the lower courts—currently exist but lack much hope of ever getting to the Court. Those issues are unquestionably important, but the Court's current approach makes it unlikely they will be reviewed. The lottery system would not immediately identify all such cases. But it is much likelier that the Court would confront seemingly settled legal questions and hopefully make sure that any consensus in the lower courts was actually correct. Thus, to the extent that the certiorari-only docket ends up leaving out some important cases, the lottery docket would alleviate that problem.<sup>215</sup>

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210. See Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 104 (2011) ("On average a Supreme Court Justice writes only 8 to 10 majority opinions a year, compared to a mean of 54 for a court of appeals judge.").

211. Law clerks for Supreme Court justices almost invariably spend a year or more clerking for other federal judges before arriving at One First Street and sometimes have additional post-law school work experience. See Harvey Gee, Book Review, 110 W. VA. L. REV. 781, 782–83 (2008) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006)).

212. Supreme Court cases—because of their national importance and their high profile—are much likelier to attract amicus briefs than cases in the circuit courts. See Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 686 (2008) (reporting results of a survey of judges and justices in which justices indicated that more than 50% of the Supreme Court cases involved amicus participation, while circuit judges reported significantly lower rates of amicus participation).

213. On the Supreme Court's library, see Judith A. Gaskell, *Supreme Service: The Supreme Court of the United States Library*, 15 TRENDS L. LIBR. MGMT. & TECH., no. 2, 2004, at 6.

214. As noted earlier, Justice Scalia's dissent from denial in *Sorich v. United States*, 555 U.S. 1204 (2009), led to later grants of certiorari which ultimately resulted in significant narrowing of the honest-services fraud statute. See *supra* Section I.B.3.

215. The lottery docket could perhaps find these missing cases more quickly if winning lottery tickets were transferrable. A litigant granted lottery-docket review could then sell her spot on the Court's docket to the highest bidder, who might, under certain assumptions, be thought to possess the most important missing case. Of course, transferrable tickets raise problematic distributional concerns and would also likely negatively impact the lottery

As a related benefit, the lottery docket might also offset the “capture” of the Supreme Court’s docket by an elite Supreme Court bar. As Richard Lazarus has documented, by the late 2000s, cases in which “expert” advocates represented the petitioner comprised more than half of the Court’s granted cases, up from only 5.8% in October Term 1980.<sup>216</sup> In Lazarus’s account, this capture is made possible because law clerks are awed by famous Supreme Court advocates and because the advocates themselves are savvy about how to present their petitions in ways that will be appealing to the justices and their clerks.<sup>217</sup> This phenomenon seems driven by the Supreme Court’s reliance on proxies for case importance in the certiorari process. Although it is hard to create a circuit split out of thin air, an experienced advocate can help identify conflict or disagreement that a case implicates and frame the petition in a particularly favorable way.<sup>218</sup> In this way, good advocacy can make the split—already imperfect as a proxy—even less useful as a proxy for the ultimately meaningful factor: importance.

The implications of the docket-capture phenomenon on the Court’s docket are significant. Outside of government practice, expert Supreme Court advocates tend to be concentrated in a particular practice environment (the elite law firm), representing particular kinds of clients (largely, big-business interests).<sup>219</sup> As Lazarus notes, “What is worrisome is the potential for an undesirable skewing in the content of the Court’s docket.”<sup>220</sup> That is, docket capture means that the Court is more likely to hear particular kinds of cases than others, not because these cases are inherently more important, but because they are ones for which high-paying clients can afford to hire elite Supreme Court practitioners. Adopting a lottery docket would counteract—though not, of course, eliminate—this distortion in the docket, since there would be no way for elite Supreme Court lawyers to influence the lottery-selection process through effective advocacy.

Whether the lottery cases would still end up captured by elite advocates in terms of representation is a different matter. One can imagine that, just as elite Supreme Court practitioners pounce on cases once certiorari is granted, the same thing would happen once cases won the lottery. But this form of capture seems less problematic, since it (unlike certiorari capture) would not be accompanied by a distortion in the Court’s caseload.

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docket’s informational and accountability benefits. Thus we note, but do not endorse, this extension of the proposal. We are indebted to Will Baude for suggesting it.

216. See Lazarus, *supra* note 7, at 90.

217. See *id.* at 93–95.

218. See Lazarus, *supra* note 82, at 1525.

219. See generally Lazarus, *supra* note 82.

220. Lazarus, *supra* note 7, at 90.

### C. Objections

In this Section we consider—and reject—several potential objections to the lottery docket. First, we show that using a lottery creates no constitutional problems. Second, we explain that the lottery docket is neither unfair nor a threat to the Court's legitimacy. Third, we contend that the lottery docket would not impose serious demands on the Court's limited resources.

#### 1. Constitutionality

A potential legal objection to the lottery docket might be grounded on a claim that randomized decisionmaking violates the due process clause of the Fifth Amendment. Jon Elster notes that, in legal contexts, “‘random’ is often synonymous with ‘whimsical,’ ‘capricious’ and ‘arbitrary.’”<sup>221</sup> Because it proscribes arbitrary government action,<sup>222</sup> the Due Process Clause poses a plausible, albeit unavailing, objection to our proposal.<sup>223</sup>

In some contexts, randomized decisionmaking in adjudicative processes is forbidden. For example, Justice O'Connor suggested in *Ohio Adult Parole Authority v. Woodard* that “a scheme whereby a state official flipped a coin to determine whether to grant clemency” might violate due process.<sup>224</sup> Indeed, the few judges who have actually used coin flips to decide cases (or even created the mere appearance that they were doing so)<sup>225</sup> have found themselves subject to judicial discipline.<sup>226</sup>

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221. ELSTER, *supra* note 194, at 102.

222. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 83–84 (1978).

223. Another potential legal objection to the lottery docket might be grounded on equal protection principles. Because losing circuit court litigants who are not selected for the Supreme Court lottery are not a protected class, however, rational basis review would apply. See Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 968 (2011) (“In the United States, the equal protection justification for tolerating both random experimentation and random assignment of government benefits is that there is a rational basis for randomization; and because there is no discrimination against a protected class, no higher standard than rational basis review is necessary.”). The rational basis for the lottery docket is explored *supra* in Section II.B.

224. 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment).

225. See, e.g., *In re Daniels*, 340 So. 2d 301, 307 (La. 1976) (upholding censure of judge whose improper conduct included giving “the appearance he was deciding the guilt or innocence of defendants upon the toss of a coin” even though “prior to the coin flipping, a decision of guilt or innocence had already been made by respondent and transmitted by him to his bailiff”).

226. See, e.g., David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 793 n.63 (1993) (accounting how a New York judge decided the length of a defendant's criminal sentence using a coin flip and was subsequently forced to leave the bench); see also ELSTER, *supra* note 194, at 98–99 (“By and large, random selection is not allowed at [the legal decisionmaking] stage. When it occurs, it is punished.”); Samaha, *supra* note 187, at 27 (“For judges, flipping coins is an easy way to draw misconduct sanctions.”).

Yet in various other contexts, the use of randomization mechanisms in adjudication is tolerated. For example, juries are randomly selected groups of citizens empowered to decide the outcomes of cases.<sup>227</sup> And juries are not unique—in the assignment of cases to district judges and of appeals to circuit panels, randomization is the norm.<sup>228</sup> Such randomization can make all the difference for a litigant. In, say, a criminal appeal in the Ninth Circuit, whether the defendant goes free or stays in prison can turn on whether the randomly assigned panel includes Judges Reinhardt, Pregerson, and Wardlaw, or instead is composed of Judges O’Scannlain, Bybee, and Kleinfeld. For the litigant much—perhaps everything—turns on this random assignment.

Yet none of this randomness has ever been considered constitutionally significant. Why is that so, when other forms of randomized decisionmaking are clearly inappropriate? How can it be improper to allow a defendant to go free based on the result of a coin flip, but perfectly fine to have that decision turn on factors (judicial assignment) that are themselves randomly selected? As Adam Samaha has shown, our legal system draws the line between permissible and impermissible randomization at the merits: courts may (and do) use randomization mechanisms for nonmerits decisions, but they may not use randomized decisionmaking procedures (like coin flips) for resolving the merits of a dispute.<sup>229</sup>

The key question, then, is whether selecting cases for review involves a determination about the merits of a case. If so, a lottery would be unquestionably improper. As Andrew Coan has put it, “[W]idely shared judicial norms . . . make it unthinkable for the Court to decide cases by coin flip.”<sup>230</sup> Luckily, though, it seems clear that deciding whether a case deserves review is not an inquiry into the merits of a case. Indeed, the very existence of certiorari jurisdiction should settle the point. The Court has unambiguously

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227. See Akhil Reed Amar, *Lottery Voting: A Thought Experiment*, 1995 U. CHI. LEGAL F. 193, 201 (noting that juries are “a place where we . . . use lotteries to vindicate ideas of political equality and democratic deliberation”). Amar notes, however, that jury selection does not operate as a pure lottery because of procedures that protect “the right of defendants to decide who will be on their jury” such as peremptory challenges. *Id.*

228. ELSTER, *supra* note 194, at 93–94; Samaha, *supra* note 187, at 47 (“Today the process of assigning cases to judges is pervaded with lotteries.”). A recent empirical study challenges the assumptions that panel assignments are perfectly random. See Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1 (2015).

229. Samaha, *supra* note 187, at 53 (“[W]e are left with an especially awkward combination: judges habitually randomize case assignments while they routinely punish merits randomization.”). Of course, the distinction between merits and nonmerits decisions can be slippery. *Id.* at 53–57. Moreover, courts do not necessarily identify due process as the reason to bar randomized merits decisions. *E.g.*, *In re Brown*, 662 N.W.2d 733 (Mich. 2003) (sanctioning judge for deciding custody issue with coin flip, but without mentioning due process). Yet it seems the most obvious grounding for any constitutional prohibition on randomized adjudication. Samaha, *supra* note 187, at 39.

230. Coan, *supra* note 125, at 427.



declared that a decision on certiorari is *not* a decision on a case's merits.<sup>231</sup> Assuming certiorari jurisdiction is constitutional as a general matter,<sup>232</sup> it follows that the Court's agenda can be set via a nonmerits-decision procedure. Because randomization is permissible for nonmerits decisionmaking, a due process challenge to the lottery docket should fail.

## 2. Fairness and Legitimacy

Even if selecting cases by lottery is constitutional and otherwise legal, that doesn't mean that it's a good idea. Might assigning cases by lottery seem unfair to litigants and thereby harm the Supreme Court's legitimacy in the eyes of the public? This objection is a reasonable one, but we find it ultimately unpersuasive.

The problem is that the current system of Supreme Court certiorari review is, from the perspective of individual litigants, already quite arbitrary and unfair. Many litigants assume that the Supreme Court exists to correct injustice.<sup>233</sup> Such individuals are often surprised to learn that the Court, for the most part, could not care less about whether a particularly egregious error happened in their particular case.

Consider a litigant who correctly believes that the circuit court significantly erred in deciding a meritorious issue on appeal. The issue might be of tremendous importance to that litigant—it might determine whether she serves a prison sentence or is compensated for an injury. But whether the Supreme Court will do anything about it depends on inscrutable and—from the litigant's perspective—arbitrary considerations having nothing to do with whether the court of appeals ignored her issue.<sup>234</sup> To get relief, the most important thing is not demonstrating to the Court the magnitude of the circuit court's mistake in the litigant's case. What matters instead is whether *other* courts confronting the same issue decided it differently. If the litigant cannot point to such a circuit conflict, she is highly unlikely to get the Court to consider her case, no matter how good her arguments on the merits.

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231. *Teague v. Lane*, 489 U.S. 288, 296 (1989) (“As we have often stated, the ‘denial of a writ of certiorari imports no expression of opinion upon the merits of the case.’” (quoting *United States v. Carter*, 260 U.S. 482, 490 (1923))).

232. We bracket the possibility that there is a viable constitutional objection to certiorari itself. That is an interesting question, and perhaps a plausible argument could be made—but the issue is far beyond our scope in this Article.

233. See, e.g., Kevin H. Smith, *Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Certiorari*, 63 ALB. L. REV. 381, 388 n.24 (1999) (“That the general public believes the Supreme Court may correct any error committed by a lower court may be inferred from public opinion surveys suggesting the Supreme Court may review and correct decisions of state courts even in the absence of a constitutional or other federal issue.”).

234. The fact that the Court almost never explains its certiorari denials does not help this situation. See Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1081 (1988) (noting that the “Court has never adopted a requirement that the Justices explain—either publicly or to their colleagues—the reasons underlying their votes on certiorari petitions”).

Under the lottery docket, such a litigant would at least have some chance to get her case heard, the error corrected, and her rights vindicated. Without doubt, that chance is a very small one. But we are concerned with relative, not absolute, judgments. The slim possibility of review for a significant but wholly isolated and factbound error makes the system, in our view, fairer than our current system, in which the litigant asking for factbound error correction has no realistic hope of getting the Court's attention.

Nor do we think the lottery would necessarily harm the Court's legitimacy. While the public might find the notion of random selection unconventional at first, over time the lottery docket could actually improve the Court's standing in the public eye. The lottery docket would likely result in the Court correcting instances of real injustice that would otherwise have resulted in certiorari denials without explanation. Of course, given the Court's limited capacities, and given our realistic ambitions for the lottery docket, many erroneous rulings would still go uncorrected. But even just a few high-profile instances of error correction might create an impression with the public that choosing some cases at random serves valuable ends.

Moreover, there is a sense in which adoption of the lottery docket would make the Court's mechanism for selecting cases more honest. As Jon Elster observes, "[t]he basic reason for using lotteries to make decision is honesty," which "requires us to recognize the pervasiveness of uncertainty . . . rather than deny or avoid it."<sup>235</sup> Along similar lines, Bernard Harcourt has argued for relying on randomization in criminal justice "[w]here our social scientific theories run out."<sup>236</sup> Given that, for example, all our scientific learning has given us no clear answers on how long a particular sentence should be, Harcourt proposes that, instead of pretending to know the right answer, judges instead "impose sentences, following conviction, based on a draw from within a legislatively prescribed sentencing range."<sup>237</sup>

Similarly, epistemic humility on the part of the justices might suggest a greater reliance on randomization in the Court's case-selection process. The justices strive to use their discretionary power of certiorari to do the most good for the federal judicial system. Yet the justices' ability to actually know where the Court's help is most needed is quite limited. The justices cannot even be aware of all that is happening in the circuit courts. Their knowledge of the district courts is more limited still.<sup>238</sup> And they have virtually no ability to know how the doctrinal rules they craft affect primary conduct in the wider world outside the judicial system. Given these limitations, how could we expect the Court to be confident that it could identify the legal issues whose resolution could produce the greater social benefits? In circumstances

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235. ELSTER, *supra* note 194, at 121.

236. Bernard E. Harcourt, *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtues of Randomization* (A Polemic and Manifesto for the Twenty-First Century), 74 Soc. RES. 307, 328 (2007).

237. *Id.* at 329.

238. Cf. Heytens, *supra* note 109, at 2053–54 (describing the Supreme Court's challenges in attempting to monitor the work of the federal district courts).

where actually identifying the important issues is so challenging, it is unsurprising that the Court relies so heavily on proxies like circuit splits. But—rather than acting as if those proxies really are the only measures of importance that matter—a more honest approach would be to admit the limits of those proxies. Using a lottery to pick some cases would mean acknowledging the inherent uncertainty involved in trying to identify the most important issues.

If nothing else, a random lottery would at least *appear* more honest to those outside of One First Street. There may be good internal reasons why the justices vote to grant or deny certiorari, but from an outsider's perspective, certiorari is both inscrutable and arbitrary, with the decision turning on factors that may have nothing to do with the specific case under review.<sup>239</sup> Lawyers and judges may understand the process, but it is especially hard for nonlawyers to grasp given the conventional understanding that the Supreme Court sits atop the hierarchy of courts.<sup>240</sup> For the ordinary litigant, might it not be better—that is, more transparent, understandable, and psychologically satisfying—to acknowledge the randomness of Supreme Court case selection by actually selecting cases at random? So too for the lawyer who must explain the Supreme Court's inevitable certiorari denial to her client.

### 3. Scarce Resources

Another potential objection to the lottery docket is that requiring the Court to decide clear-cut cases without significant legal implications would stretch its resources. There is a sense in which this is true—the lottery docket would entail additional work for the Court. That additional work represents a private cost for the justices and their staffs. Whether it constitutes a *social* cost depends on whether it would negatively affect the quality of Supreme Court decisions.

Many commentators have noted the steep decline in the Court's caseload over the last twenty-five years.<sup>241</sup> While the exact size of the Court's docket fluctuated during the twentieth century, from the 1960s until the late

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239. As one federal circuit judge has observed, "Generally whether they [the Supreme Court] are going to take a case . . . is a 'crap shoot.'" Bowie & Songer, *supra* note 105, at 397. Of course, it is only a "crap shoot" for the cases with some markers of cert-worthiness; the obviously noncertworthy cases have no shot at being selected. See *supra* note 110 and accompanying text.

240. See Robert Laurence, *Cert. Denied: Brief Commentary on Swanner v. Anchorage Equal Rights Commission and City of Boerne v. Flores*, ARK. L. NOTES, 1998, at 87 ("And, of course to the parties there is little difference between granting *cert.* and affirming, on the one hand, and denying *cert.*, on the other."); *id.* ("Justice Holmes is said once to have responded to a non-lawyer friend's query by observing that God did not intend that the friend ever know what a writ of certiorari is, and perhaps that is enough to allow folks to go about their businesses."); Kathleen M. Sullivan, Foreword, *Interdisciplinarity*, 100 MICH. L. REV. 1217, 1219 (2002) ("With rare and brilliant exception . . . even the cleverest non-lawyers routinely garble such summaries, seeing holdings in cert. denials . . .").

241. See sources cited *supra* note 5.

1980s, the Court decided in the neighborhood of 150 cases per year.<sup>242</sup> On the other hand, the Roberts Court has averaged eighty-one certiorari grants cases per term between October Term 2005 and October Term 2014.<sup>243</sup> The drop-off in cases is powerful evidence that the Court has decisionmaking capacity in reserve.<sup>244</sup> To be sure, we do not suggest that the Court return to deciding 150 cases each year.<sup>245</sup> As Randy Kozel and Jeffrey Pojanowski observe, “[I]f the Supreme Court’s docket were markedly larger—as it was for much of the twentieth century—its ability to function effectively as a rulemaker would suffer.”<sup>246</sup> Yet as Carolyn Shapiro observed in 2006 (when the decline had not yet reached its current level), “There is a lot of room between the eighty-five or ninety cases the Court currently decides and the 150 that most commentators view as too many.”<sup>247</sup>

Two caveats are necessary. First, we cannot rule out the possibility that the cases the Court hears today are more complex or difficult, and thus take more time to decide. But this is unlikely, and we take solace in scholarship attributing the docket decline to factors other than case complexity, such as the ideological dispersion of justices,<sup>248</sup> the influence of the cert pool,<sup>249</sup> and an increasing unwillingness by justices to engage in error correction.<sup>250</sup> We also cannot rule out the possibility that the current number of cases is optimal for Supreme Court decisionmaking—that is, that the Court’s post-decline decisions are “better” than its older decisions.<sup>251</sup> We know of no way to empirically assess the quality of Supreme Court decisions, but Linda Greenhouse reported in 2006 that the “justices themselves . . . seem mystified at what they perceive as a paucity of cases that meet the court’s standard criteria.”<sup>252</sup> The justices’ “mystification” is hard to reconcile with the idea that

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242. Owens & Simon, *supra* note 183, at 1228–29.

243. This figure is based on Table II(B) of the *Harvard Law Review’s* Supreme Court statistics for each term. See, e.g., *The Statistics, October Term 2014*, *supra* note 5; *The Supreme Court, 2005 Term—The Statistics*, 120 HARV. L. REV. 372, 380 (2006).

244. See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3155–56 (2015) (“Moreover, the U.S. Supreme Court’s ‘shrunk docket’ suggests that it has substantial unused capacity to control errors and promote consistency in the lower courts: the Court’s docket remains roughly half of what it was decades ago.” (footnote omitted) (quoting Hellman, *supra* note 5)).

245. See text accompanying *supra* note 183 (noting that Court heard more than 150 cases per year in the 1980s).

246. Kozel & Pojanowski, *supra* note 81, at 222.

247. Shapiro, *supra* note 6, at 335.

248. Owens & Simon, *supra* note 183, at 1275–77.

249. See Stras, *supra* note 60.

250. Hellman, *supra* note 5, at 429–38.

251. Erwin Chemerinsky, *The Incredible Shrinking Docket*, TRIAL, Mar. 2007, at 64, 64–65 (“What accounts for this dramatic downsizing? Perhaps the justices want to take fewer cases and work harder on them.”).

252. Linda Greenhouse, *Case of the Dwindling Docket Mystifies the Supreme Court: Legal Scholars Offer Theories on a Drop in Appeals*, N.Y. TIMES, Dec. 7, 2006, at A1, <http://query.nytimes.com/gst/fullpage.html?res=950CE0D61631F934A35751C1A9609C8B63> (on file with the *Michigan Law Review*).

the Court's current docket size reflects an optimal decisionmaking environment.

#### 4. Percolation

A final objection to the lottery docket is the flip side of one of the arguments in favor of the Court's emphasis on circuit splits. One reason to wait for splits is to let cases "percolate": "The ideal of percolation . . . is to allow several lower courts to consider a legal problem before the Supreme Court rules on it, thus giving the High Court the benefit of the considered judgments of a number of jurists."<sup>253</sup> By waiting to address difficult legal questions until an entrenched split has developed, the Court assures itself that the best arguments on both sides have been aired.<sup>254</sup> The risk with the lottery docket is that, because it would force the Court to decide whatever legal issues arose in the appeals, some legal issues would reach the Court before they had a chance to steep sufficiently in the cauldron of the lower courts.

This is unquestionably a risk. The question, though, is whether this risk outweighs the benefits of the lottery docket. The problem is that for many legal issues, no meaningful percolation occurs: the first circuit court decides the issue, the next one follows without a great deal of independent thought, and so on before a consensus is reached. Giving those legal issues a chance at Supreme Court review also means letting some other legal issues reach the Court before a developed split has a chance to emerge. Whether one thinks that cost outweighs the benefits depends on one's view of percolation. One of us has written about the value of percolation in other contexts,<sup>255</sup> and this is not the time or place to conclusively determine exactly how much benefit percolation provides to the justices.

It suffices, though, to note that the percolation argument for the Court's approach to certiorari is not without its critics.<sup>256</sup> And percolation itself is not without significant costs. For example, the Court let the honest-services fraud statute discussed above percolate in the lower courts for decades before stepping in via the *Skilling* case.<sup>257</sup> What good did all that percolation provide? It is not clear, given that the Court endorsed a view of the statute

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253. Shapiro, *supra* note 6, at 331.

254. See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984) ("The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts.").

255. See Ortman, *supra* note 153, at 247–48 (arguing that "two-tier judicial structures offer the benefits of Supreme Court percolation in miniature").

256. See, e.g., Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 57 (1994) ("[T]he claim that inferior court percolation is essential to provide a comprehensive array of analyses and approaches available to the Supreme Court seems to inflate its contribution significantly.").

257. See *supra* notes 136–139 and accompanying text.

narrower than that adopted by any circuit court.<sup>258</sup> And by letting percolation proceed for so long, the Court might have permitted dozens or hundreds of defendants to be convicted of a federal crime based on broad theories that the Court would ultimately repudiate. In that case, at least, it is unclear whether percolation was worth the cost of admission.

Moreover, even if we agree that percolation is important, the lottery docket does not necessarily make percolation impossible. The Court may be able to resolve appeals in ways that avoid short-circuiting the lower court decisionmaking process if an issue has the hallmarks of requiring percolation (most commonly, complexity or difficulty).<sup>259</sup> Sometimes it may be possible to dispose of an appeal on narrow or fact-specific grounds. Where that is so, and where percolation appears likely to be helpful, the Court could thus avoid short-circuiting that process while still ruling on the merits of a party's appeal. We hesitate to suggest the Court do this too regularly, because it would undermine what we see as one of the major benefits of our proposal were the Court to avoid issues of law in favor of one-off, case-specific rulings. But the possibility is there for situations where resolving a major legal issue seems unwise or premature.

### III. IMPLEMENTATION AND OPTIMIZATION

This Part addresses some finer details of the proposed lottery docket. We aim not to specify the lottery's contours with precision, but rather to indicate the costs and benefits of plausible design choices. Section III.A discusses whether litigants should have to affirmatively opt in to the lottery or whether instead all final judgments should be automatically entered. Section III.B addresses whether the lottery should be weighted in some way to reflect the underlying distribution of issues in the trial courts. And Section III.C complicates the proposal by considering whether final judgments of state courts might properly be included in the lottery.

#### A. *Opt-in or Automatic Entry*

One key design choice concerns how the lottery "tickets" are assigned. Do all final judgments of the circuit courts get entered into the lottery? Or must the litigants opt in through some affirmative act? Automatic entry has some appeal. If the goal is to give the Court a more representative sample of what is happening in the lower courts, then ensuring that all the circuit court decisions are entered would better serve that goal.

But automatic entry has some drawbacks. Normally, in our legal system, a losing party must affirmatively exercise the right to appeal.<sup>260</sup> Fail to file a notice of appeal within the time limit, and you lose forever the right to

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258. See *supra* note 134 and accompanying text.

259. See Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 620 (1984).

260. FED. R. APP. P. 3(a)(1).

further judicial review.<sup>261</sup> Requiring some form of opt-in would be more consistent with that traditional practice. One might even argue that without affirmative opt-in, there is no longer an Article III case or controversy.<sup>262</sup> There is also some danger that a few litigants (because they had not asked for further review) might not even realize what had happened and might fail to advance their cases despite winning the lottery. (Though perhaps this problem would be solved by the existence of Supreme Court clinics and the like, who would eagerly pounce on cases after they win the lottery—much as they do now when certiorari is granted.)<sup>263</sup>

Moreover, one advantage of requiring opt-in is that it could be used as a tool to reduce the inflow of certiorari petitions. What if litigants were given the opportunity of choosing to enter the lottery or filing a certiorari petition? Under the current system, many petitions are filed with little realistic chance of being granted because the cases implicate no splits and are otherwise unimportant from the Court's perspective. Such a petition represents a Hail Mary—a desperate final attempt to get the Court to correct an error. These petitions take time for the Court's personnel to deal with.<sup>264</sup> In a world where litigants could choose between paying for numerous attorney hours in preparing a certiorari petition that is almost certain to be denied, or instead entering the lottery at no cost, and thus having a small, but nonzero, chance of getting an appeal, we think many litigants would opt for the lottery. The result might be fewer certiorari petitions filed, with a higher percentage bearing the actual criteria the Court is looking for. That would give the Court more time to carefully weigh the meritorious certiorari petitions while still giving litigants with non-cert-worthy cases some chance of having their cases reviewed.

That approach would, however, exacerbate the problem that the subset of lottery cases would not be fully representative of all circuit cases. Cases involving difficult purely legal questions might be underrepresented. But perhaps this is not a problem because such cases are already so *over*-represented in the certiorari docket. But it is not at all clear whether these two effects perfectly cancel out. Ultimately, which approach to take may depend in part on the separate design choice considered in the next Section.

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261. See *Bowles v. Russell*, 551 U.S. 205, 213–14 (2007) (holding that time limit for filing notice of appeal in a civil case is jurisdictional).

262. The argument, which we note but do not resolve, is that unless a party affirmatively seeks review in the Supreme Court (or at least acquiesces to review once granted), there are not “interested parties asserting adverse claims” before the Court. See Note, *What Constitutes a Case or Controversy Within the Meaning of Article III of the Constitution*, 41 HARV. L. REV. 232, 233 (1927) (arguing that the existence of such parties is “[t]he first essential of a case or controversy”). We are grateful to Tara Leigh Grove for pointing out the potential objection.

263. See, e.g., Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 158 (2013) (relaying anecdote in which a respondent's counsel received eighteen offers of assistance from other lawyers within forty-eight hours of Court's grant of certiorari).

264. They also consume the time of lawyers, who have to spend many hours drafting petitions likely to be dismissed out of hand because they do not satisfy the conventional certiorari criteria. And of course they consume the resources of those lawyers' paying clients.

B. *Weighted Draws*

A further choice is whether to adopt a straight or weighted lottery. A straight lottery would give every final circuit court decision an equal chance of winning.<sup>265</sup> A weighted lottery, on the other hand, would make certain circuit decisions more likely to be selected, and others less likely.<sup>266</sup> The likely candidate is to assign weights that make the lottery docket resemble the caseload of district courts.<sup>267</sup> This Section explores the possibility of weighting lottery entries to compensate for differences between circuit and district dockets. As a lottery docket could be successfully implemented with or without weighting, we take no ultimate position on the question.

At first cut, the choice between a straight and weighted lottery turns on a trade-off between the lottery docket's informational and accountability mechanisms. As we have discussed, the informational value of the lottery docket lies in the accurate information it would convey to the justices about the type and distribution of disputes governed by the laws the Court interprets.<sup>268</sup> We have so far bracketed whether circuit court or district court dockets are more representative of that universe of disputes, but there is a good argument for district courts.<sup>269</sup> Because many legal disputes are resolved out of court, no court's docket perfectly reflects the universe of disputes governed by law. Each step up the judicial ladder further cuts the number of disputes, moving its docket further from the full universe. District court cases have, by definition, undergone one fewer round of cuts than circuit court cases, likely making them more representative of all disputes.<sup>270</sup> This makes it important to know whether there are systemic differences between circuit and district dockets. There are, as the tables below show.

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265. See I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 246 (2013) ("In simple lotteries, every eligible claimant is given an equal probability of getting the good.").

266. See *id.* ("Metaphorically, weighted lotteries use dice that are weighted toward certain numbers, but still have a chance of rolling up on the unweighted ones.").

267. An alternative weighting strategy would be to enhance the lottery docket's accountability mechanism by assigning extra weight to cases from "underperforming" circuits. That would, of course, raise difficult questions about defining what constitutes circuit underperformance. We are indebted to Shay Lavie for suggesting this extension.

268. See *supra* notes 185–186 and accompanying text.

269. See *supra* notes 92–93 and accompanying text.

270. The only reason this would not be true is if the bias introduced by district court cases that do not lead to appeal somehow cancelled out the bias created from disputes that settle before reaching district court.



TABLE 1. NEW CIVIL CASES, 2015–2016<sup>271</sup>

Case Type	Percentage of New Civil Cases	Percentage of New Civil Appeals	Difference
Civil Rights	12.9%	18.9%	6.0%
Contract	8.5%	7.3%	–1.2%
Intellectual Property	4.3%	1.2%	–3.1%
Labor	6.6%	3.0%	–3.6%
Other	11.8%	10.5%	–1.4%
Prisoner	24.4%	48.8%	24.4%
Real Property	3.1%	1.5%	–1.6%
Securities	0.4%	0.6%	0.2%
Social Security	6.3%	2.3%	–4.0%
Torts	21.6%	6.0%	–15.6%

TABLE 2. NEW CRIMINAL CASES, 2015–2016<sup>272</sup>

Offense Type	Percentage of New Criminal Cases	Percentage of New Criminal Appeals	Difference
Violent	3.6%	4.3%	0.7%
Property	14.3%	12.6%	–1.6%
Drugs	32.1%	43.6%	11.5%
Firearms and Explosives	10.9%	16.2%	5.4%
Sex Offenses	4.2%	6.6%	2.4%
Justice Systems	1.0%	1.2%	0.1%
Immigration	27.0%	12.1%	–15.0%
General Offenses	2.3%	2.3%	0.1%
Regulatory	1.8%	1.1%	–0.7%
Traffic	2.9%	0.0%	–2.9%

271. The data, which is for the twelve-month period ending June 30, 2016, are from Tables C-2 and B-7 of the Statistical Tables for the Federal Judiciary, provided by the Administrative Office of the U.S. Courts. See *Table B-7: U.S. Courts of Appeals—Civil and Criminal Cases Commenced, by Circuit and Nature of Suit or Offense*, U.S. COURTS, [http://www.uscourts.gov/sites/default/files/data\\_tables/stfj\\_b7\\_630.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/stfj_b7_630.2016.pdf) [https://perma.cc/9BD7-JE7Z] [hereinafter *Table B-7*]; *Table C-2: U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit*, U.S. COURTS, [http://www.uscourts.gov/sites/default/files/data\\_tables/stfj\\_c2\\_630.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/stfj_c2_630.2016.pdf) [https://perma.cc/ZW77-C3ND] [hereinafter *Table C-2*].

272. *Table B-7*, *supra* note 271; *Table D-2: Criminal Defendants Commenced, by Offense*, U.S. COURTS, [http://www.uscourts.gov/sites/default/files/data\\_tables/stfj\\_d2\\_630.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/stfj_d2_630.2016.pdf) [https://perma.cc/U6XB-7AEJ] [hereinafter *Table D-2*]. Two caveats are necessary about these figures. First, the available data count district court matters by defendants, but circuit court

Negative numbers in the “Difference” column reflect case types that are underrepresented on appeal (relative to district court dockets), while positive numbers show types that are overrepresented. By giving extra weight to cases underrepresented on appeal, the lottery docket could compensate for these imbalances and make it more representative of district court caseloads. Over time, the justices would acquire information about the type and distribution of disputes that occupy the district courts, while still reviewing circuit court decisions.

On the other hand, a weighted lottery would detract from the lottery docket’s accountability function. Circuit judges hearing overrepresented cases would know that their decisions are especially unlikely to win the lottery, attenuating the accountability that the lottery docket offers in those cases. This may not be of much practical significance, however, as the probability of lottery-docket review will be small in every case. Notwithstanding the weighting, moreover, the chance of Supreme Court review will be nonzero even in overrepresented quotidian cases, which, we suggested above, is the central advantage (in this respect) of the lottery docket.<sup>273</sup> While weighting the lottery would diminish the accountability benefit of adopting a lottery docket, the effect may thus be small.

A more significant objection is that weighting lottery entries would introduce a series of administrability concerns. While these obstacles could be overcome, they introduce costs that an unweighted lottery would not encounter. We will note three potential difficulties, but there are surely more.

First, the lottery administrator would need to decide what characteristics of district court cases should be weighted.<sup>274</sup> The obvious choice is to assign weights by case “type,” but this raises further level-of-generality problems. The broadest cut is between civil versus criminal cases. Because criminal cases tend to be overrepresented in circuit courts,<sup>275</sup> extra weight could be assigned to civil lottery entries. But this would be a fairly crude accounting. Alternatively, cases could be assigned to categories—for instance violent offenses and property crimes on the criminal side, and civil rights and real property cases on the civil ledger, as the official judiciary statistics currently do.<sup>276</sup> Or the weighting could be more granular, for instance, identifying particular criminal offenses and civil causes of action. The choices matter. For example, in the year ending June 30, 2016, the category “property offenses” made up a slightly smaller portion of circuit courts’ criminal

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matters by case. This has the potential to skew results if multidefendant cases are more likely in some case types than others. Second, approximately 7% of criminal appeals are listed as unclassified. If the unclassified appeals (which were disregarded for purposes of calculating docket percentages) are skewed by case type, that too could distort the results.

273. See *supra* Section II.B.2.

274. For instance, if it turns out that governmental plaintiffs are overrepresented in circuit dockets, weighting could be used to boost cases with private plaintiffs.

275. In the year ending June 30, 2016, criminal cases accounted for 22% of new federal district court cases (including multi-defendant cases), and 30% of new circuit court cases. See *Table B-7, supra* note 271; *Table C-2, supra* note 271; *Table D-2, supra* note 272.

276. *Table B-7, supra* note 271; *Table C-2, supra* note 271; *Table D-2, supra* note 272.

dockets than district courts' criminal dockets, meaning that property crimes were underrepresented on appeal.<sup>277</sup> But health-care fraud, one component of property crime, was slightly overrepresented in appeals.<sup>278</sup> Whether health-care fraud decisions would receive a positive or negative weight turns on the level of generality selected. A weighted lottery would have to sort through these difficult level-of-generality issues.

Second, a weighted lottery would confront the problem of assigning weights to cases that originate in circuit courts, most significantly in administrative law cases. Many of the most important cases in administrative law originate in circuit courts pursuant to "direct review" statutes.<sup>279</sup> If weights are assigned to make the lottery docket resemble district court caseloads, the direct review cases would be absent from the lottery docket entirely.<sup>280</sup> A weighted lottery docket would need to determine what, if any, priority to give direct review cases.

Third, in a weighted lottery system, someone must continuously monitor federal dockets and update the weights. That by itself makes a weighted lottery costlier to administer than a straight lottery. Moreover, as the preceding discussion shows, assigning weights involves difficult choices with distributional consequences. The lottery administrator in a weighted system would thus have significant political power, raising a further institutional design question of who, or what office, gets the assignment. In a straight lottery, on the other hand, once the size of the docket is fixed and the method of randomization chosen,<sup>281</sup> actually running the lottery would be a mechanical task without significant political implications.

### C. State Cases

Thus far we have assumed that only federal circuit court decisions would be included in the lottery. In principle, the final decisions of state courts could also be eligible to enter the lottery when they implicate questions of federal law. If there are categories of federal law litigated more commonly in state courts than in federal courts, including state cases could make the lottery docket an even better antidote to the informational and missing cases problems identified earlier. Extending the lottery to state cases, however, introduces complexities not seen in the federal context. This Section evaluates two such complexities. Once again, because a lottery docket could be implemented with or without state cases, we take no ultimate position.

First, whether to include state cases depends in part on one's theory of the Supreme Court's role in supervising state courts. While the Supreme

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277. See Table B-7, *supra* note 271; Table D-2, *supra* note 272.

278. See Table B-7, *supra* note 271; Table D-2, *supra* note 272.

279. See Ortman, *supra* note 153, at 235 n.57, 236.

280. One of us has argued elsewhere that an appellate-review mechanism would improve judicial decisionmaking in direct-review cases. *Id.* at 244–59.

281. See *supra* text accompanying notes 173–174 and text following note 183.

Court's supervisory role over federal courts is relatively straightforward,<sup>282</sup> its relationship to state courts is more complicated. Jason Mazzone argues that the Supreme Court's "supremacy" on questions of federal constitutional law, vis-à-vis state courts, is a twentieth-century myth.<sup>283</sup> Under the Judiciary Act of 1789, Mazzone notes, the Supreme Court lacked jurisdiction to review cases in which a state court held that a state statute violated the federal constitution.<sup>284</sup> State courts interpreted the Supreme Court's limited jurisdiction as negating the possibility that the Supreme Court was "the common arbiter for the decision of [federal] questions."<sup>285</sup> Acknowledging an independent role for state courts in interpreting federal law makes sense, according to Mazzone, because "[t]hough they apply federal law, state courts are no more lower federal courts than the state legislatures are subunits of Congress or the state governors agents of the federal executive branch."<sup>286</sup> Mazzone's view is, of course, contestable. James Pfander, for instance, argues that when they decide federal claims, state courts are best understood as inferior tribunals constituted by Congress under Article I, Section 8, and thus necessarily inferior to the Supreme Court.<sup>287</sup>

Whether the state courts have an independent role to play with respect to the development of federal law is well beyond our scope here. But if the independent-role story is right, it complicates the accountability argument for a lottery docket. The accountability of state judges deciding federal law, on the independent-role view, depends on state political processes, not Supreme Court reversal.<sup>288</sup> Subjecting state court decisions to random auditing would thus—for proponents of an independent role—represent a cost, not a benefit, of applying the lottery to state cases. It remains possible that the informational and missing case arguments for a lottery docket would offset this cost, but the burden on those arguments would be greater.

Second, at a practical level, the lottery would need to identify which state cases were eligible for the lottery. Defining what sort of federal questions make a case eligible for the lottery would be simple. The starting point would likely be the doctrines currently governing Supreme Court certiorari review of state judgments. Thus, only an issue that could properly be the basis of certiorari review could be the basis of an appeal through the lottery docket. Figuring out whether a particular case is eligible, then, would require a careful analysis of the record to determine whether any federal issues are

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282. See *supra* notes 103–104 and accompanying text.

283. Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 Nw. U. L. REV. 979, 982 (2010).

284. *Id.* at 983; see also Frost, *supra* note 123, at 1617 ("Nor did the [1789] Act give the Supreme Court appellate jurisdiction to review all state courts' rulings concerning federal law.").

285. Mazzone, *supra* note 283, at 987 (quoting *Skelly v. Jefferson Branch of the State Bank of Ohio*, 9 Ohio St. 606, 612 (1859), *rev'd*, 66 U.S. 436 (1861)).

286. *Id.* at 1045 (footnotes omitted).

287. James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 Nw. U. L. REV. 191 (2007).

288. Mazzone, *supra* note 283, at 1050–57.

present and properly preserved, and whether Supreme Court review of those issues would be barred by the adequate-and-independent-state-ground doctrine.<sup>289</sup>

What would be necessary, however, is some mechanism that sorted eligible and ineligible state appeals before they reached the justices. The lottery docket's point is for the justices to confront federal questions that would otherwise evade review, not to make threshold determinations about whether a case has federal questions. Perhaps the cases initially selected in the lottery could be reviewed by the justice's law clerks in order to evaluate whether federal issues were present. Such a task would be similar to the review for adequate and independent state grounds that is already part of the law clerks' review of certiorari petitions from state court judgments.<sup>290</sup> To make this sorting more efficient, one could require the lottery entrants to file a notice of federal issues stating which issues they hoped to raise on appeal. While these details of the screening process need not ultimately detain us here, there is little doubt that they would add to the administration costs of the lottery docket.

#### CONCLUSION

The Supreme Court's current certiorari process has on occasion been compared to a lottery, in its unpredictability and apparent randomness.<sup>291</sup> To those who file certiorari petitions, it certainly must feel like one. Yet, in our view, the problem with the certiorari process is that it is not *truly* a lottery. A real lottery system would expose the Court to a broader swath of cases, increase the Court's ability to control the lower courts, and increase the likelihood that the Court would address important legal questions that might otherwise escape its notice. Picking cases for review at random might at first seem strange or capricious. But it would be ultimately fairer to litigants than the current approach—at the very least, it would be no more *unfair*. At first, the justices might bridle at being asked to spend their precious time resolving some seemingly trivial appeals. But making the High

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289. The Court's adequate-and-independent-state-ground jurisprudence has addressed the circumstances when a federal issue can properly be reviewed by the Court notwithstanding an apparent state law ruling supporting the judgment. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (holding that, when a state court decision that rests on both federal and state law, the Court will assume no adequate and independent state ground exists absent a clear statement to that effect by the state court).

290. *See Shapiro, supra* note 6, at 285 ("Most law clerks review petitions for certiorari with a presumption against granting coupled with a kind of checklist of reasons *not* to grant. . . . Is there an independent state law ground for the lower court judgment? Deny.").

291. *See, e.g., Laurie L. Levenson, Cases of the Century*, 33 *LOY. L.A. L. REV.* 585, 601 (2000) ("From prison, Gideon entered the certiorari lottery."); Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 *VA. TAX REV.* 1, 63 (2008) ("[S]tate courts can choose to play what can be called 'the cert lottery,' holding for the home team while betting on the unlikelihood that aggrieved taxpayers can get the U.S. Supreme Court to hear their cases.").

Court confront a handful of low-profile cases every year would serve the most important ends.